80-990

No. .....

Supreme Court, U. S.
FILED
DEC 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in his official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer for the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic;

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

JOHN H. LARSON, County Counsel,
WILLIAM F. STEWART, Chief
Labor Relations Division,
648 Hall of Administration,
500 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-1829,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

No. .....

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in his official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer for the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

JURISDICTIONAL STATEMENT.

Questions Presented.

1. Does a deputy probation officer in light of California's statutory duties fall within that group of public service positions which the state and local governments may reserve for American citizens; Is California's statute which requires deputy probation officers as peace officers to be United States citizens unconstitutional as applied?

2. Is the California statute which provides that public officers declared by law to be peace officers must be citizens of the United States unconstitutionally overbroad when considered in light of a separate companion statute which specifically declares deputy probation officers to be peace officers?

3. Did the plaintiffs who were applicants only for the deputy probation officer position have standing to challenge California Government Code Section 1031a as overbroad because it included by separate statutory reference other job categories.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	1
State Statute Involved	2
Statement of the Case	2
Compelling Reasons Support Plenary Consideration	4
I.	
Probation Officers in California Are a Class of Public Employees That Can Be Required to Be United States Citizens	6
II.	
A Statute Which Provides That "Each Class of Public Officers or Employees Declared by Law to Be Peace Officers" Shall Be a Citizen of the United States Is Not Constitutionally Overbroad When a Separate Companion Statute Specifies That Probation Officers Shall Be Peace Officers	14
III.	
Plaintiffs Have No Standing	18
Conclusion	19

INDEX TO APPENDICES

Appendix A. Opinion	App. p. 1
Dissenting Opinion	14
Appendix B. Final Judgment	25
Appendix C. Notice of Appeal to the Supreme Court of the United States	31
Appendix D. Opinion	34
Appendix E. California Code of Civil Procedure, Section 131.4	66

TABLE OF AUTHORITIES

Cases — Page

Ambach v. Norwich, ... U.S. ...., 99 S.Ct. 1589 (1979) 5, 6, 7, 8

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 15, 16

Chavez-Salido v. Cabell, ... F.2d ...., 23 FEP Cases 112 ..... 7, 17

Foley v. Connelie, 435 U.S. 291, 17 FEP Cases 1 (1978) 1, 5, 6, 7, 8, 13, 17

Sugarman v. Dougall, 413 U.S. 634 (1973) 14, 17

United States v. Raines, 362 U.S. 17 (1960) 15

Constitution

United States Constitution, First Amendment 17

United States Constitution, Fourteenth Amendment ... 3

Statutes

California Code of Civil Procedure, Sec. 131.3 2

California Code of Civil Procedure, Sec. 131.4 .... 2, 6, 9

California Government Code, Sec. 1031 ..... 5, 17

California Government Code, Sec. 1031(a) .... ii, 2, 3, 4, 6, 14, 17, 18

California Penal Code, Sec. 830.1 ..... 6, 18

California Penal Code, Sec. 830.5 ..... 2, 6, 9, 14

California Penal Code, Sec. 1203 ..... 2, 10

California Penal Code, Sec. 1203.1 ..... 2, 9

California Penal Code, Sec. 1203.1a 2, 9, 10

California Penal Code, Sec. 1203.2 ..... 2, 9

California Penal Code, Sec. 1203.10 2

California Penal Code, Sec. 1203.13 ..... 2, 11

California Penal Code, Sec. 1203.14 ..... 2, 11

California Penal Code, Secs. 11175-11179 10

Page

California Welfare and Institutions Code, Sec. 236 ..... 2, 11
California Welfare and Institutions Code, Sec. 280 ..... 2, 11
California Welfare and Institutions Code, Sec. 283 ..... 2, 6, 9
California Welfare and Institutions Code, Sec. 300 ... 11
California Welfare and Institutions Code, Sec. 305 ... 11
California Welfare and Institutions Code, Sec. 309 ... 11
California Welfare and Institutions Code, Sec. 325 ... 11
California Welfare and Institutions Code, Sec. 326 ... 11
California Welfare and Institutions Code, Sec. 356 ... 11
California Welfare and Institutions Code, Sec. 627.5 10
California Welfare and Institutions Code, Sec. 628 ..... 2, 10
California Welfare and Institutions Code, Sec. 630 ..... 2, 10
California Welfare and Institutions Code, Sec. 727 ..... 2, 11
California Welfare and Institutions Code, Sec. 730 ..... 2, 11
California Welfare and Institutions Code, Sec. 731 ..... 2, 11
United States Code, Title 28, Sec. 1253 1
United States Code, Title 28, Sec. 1331(a) 3
United States Code, Title 42, Sec. 1981 ..... 3, 4
United States Code, Title 42, Sec. 1983 3

This is the second time this case has been appealed to the United States Supreme Court. In acting on the original appeal, this Court in an order dated May 15, 1978, vacated the judgment of the three-judge district court and remanded the case for further consideration in light of *Foley v. Connelie*, 435 U.S. 291 (1978).

Opinions Below.

The Order of the Chief Judge of the Circuit Court convening the three-judge court and the basis for such action is set forth in the initial opinion of the three-judge district court, dated February 3, 1977, and is reproduced in Appendix D, p. 39, note 4, to this Jurisdictional Statement. The jurisdictional basis for the Court's action was readopted in their subsequent opinion dated June 4, 1980, and reproduced in Appendix A, p. 2.

The opinion of the three-judge district court (including dissent) dated June 4, 1980, from which this appeal is taken is not reported. It is reproduced in Appendix A, pp. 1-24, to this Jurisdictional Statement.

The opinion of the three-judge district court, dated February 3, 1977, is reported at 427 F.Supp. 158 (C.D. CA). It is reproduced in Appendix D, pp. 34-35.

Jurisdiction.

The jurisdiction of this Court is conferred by 28 U.S.C. Section 1253.

The judgment of the three-judge district court was entered August 19, 1980 and is reproduced in Appendix B, pp. 25-30 to this Jurisdictional Statement.

The Notice of Appeal to this Court was filed on October 20, 1980 and is reproduced in Appendix C, pp. 31-33.

State Statute Involved.

California Government Code Section 1031(a) provides in pertinent part:

> "Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:
>
> (a) Be a citizen of the United States;. . ."

California Penal Code Section 830.5 provides in pertinent part:

> "(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, probation officer, or deputy probation officer is a peace officer. . ."

Other California statutes important to the resolution of the issues presented in this case include Penal Code Sections 1203, 1203.1, 1203.1a, 1203.10, 1203.2, 1203.13, 1203.14, 11175-11179; Welfare and Institutions Code Sections 236, 283, 280, 628, 630, 727, 730, 731; and Code of Civil Procedure Sections 131.3, 131.4.

Statement of the Case.

As noted, this is the County of Los Angeles' second appeal in this action, the original judgment having been ordered vacated by this Court on May 15, 1978. 436 U.S. 901.

Appellees Chavez-Salido, Ybarra and Bohorquez, as of the date the complaint was filed, were lawfully admitted permanent resident aliens living in Los Angeles County. Appellee Chavez-Salido applied for the job of Deputy Probation Officer II on March 27, 1975. On the required civil service examination, Chavez-Salido scored a passing grade of 95. In September he was informed a job opening existed but would have to show proof of citizenship to be appointed to the position. Solely because he was unable to do so, he

was denied this position. Chavez-Salido applied for and was granted citizenship on March 15, 1976.

Appellee Ybarra applied for the positions of Deputy Probation Officer I and II in October and August of 1975 respectively. He was informed of the citizenship requirement for both positions and, being unable to show proof of his citizenship, was denied employment as a DPO I and a position on an eligibility list for DPO II. These denials were solely the result of the statutory citizenship requirement of Section 1031(a) of California's Government Code. Ybarra has not applied for American citizenship.

Appellee Bohorquez applied for the position of Deputy Probation Officer II in January of 1975. During the civil service examination, he was informed he could not be appointed to the position because of his lack of citizenship. In light of this information, he did not avail himself of his right to appeal the failing score he received on his examination. At the time of the court's decision, Bohorquez had not filed for United States citizenship.

Appellees commenced this action for injunctive and declaratory relief under the Equal Protection Clause of the Fourteenth Amendment and Sections 1981 and 1983 of Title 42 U.S.C. Their claim was unlawful discrimination based on alienage. Damages were sought by two of the claimants.

All parties agreed a three-judge court was appropriate and on April 26, 1976 the Chief Judge for the Ninth Circuit convened the court from which this appeal is being taken. The case was originally tried and argued August 20, 1976 on stipulated facts.

The district court held it had jurisdiction over the County of Los Angeles under 28 U.S.C. Section 1331(a) in that Appellees' complaint stated a cause of action under both

the Fourteenth Amendment and 42 U.S.C. Section 1981 and the amount in controversy exceeded $10,000.

In an opinion filed February 3, 1977, and published at 427 F.Supp. 158, 17 FEP Cases 646 (C.D. Cal. 1977) (Appendix D herein), the three-judge district court declared California Government Code Section 1031a to be unconstitutional, finding that the statute involved a suspect classification to which the strict scrutiny test must be applied.

The district court's decision was appealed to the United States Supreme Court. In an order dated May 15, 1978, this Court ordered the judgment of the three-judge district court vacated and remanded the case to the three-judge court "for further consideration in light of *Foley v. Connelie*, 435 U.S. 291, 17 FEP Cases 1 (1978)." 436 U.S. 901, 17 FEP Cases 699 (1978). The matter was rebriefed and reargued before the three-judge district court on December 8, 1979.

In an opinion filed June 4, 1980, the three-judge district court, with Judge Curtis dissenting, again reached the same result, declaring Section 1031a of the Government Code unconstitutional on precisely the same grounds stated in their earlier decision. The court again found that the statute was 1) constitutionally overbroad and 2) the statute as applied denied the plaintiffs the equal protection of the law. (Appendix A, pp. 2-3). The court rejected appellants' argument that the plaintiffs who were only applicants for the deputy probation officer position lacked standing to challenge the statute's application to other classifications of peace officer. (Appendix A, p. 7, note 7).

Compelling Reasons Support Plenary Consideration.

The decision below misapplied and consequently erroneously narrowed the permissible scope of a citizenship requirement for public employees contrary to this Court's guidance and the newly developed standards established in

Foley v. Connelie, 435 U.S. 298 (1978) and *Ambach v. Norwick*, ... U.S. ...., 99 S.Ct. 1589 (1979). It is clear that in California, and undoubtedly in all other jurisdictions, deputy probation officers exercise some of the most essential powers of government—those powers directed toward the punishment and rehabilitation of criminals. Probation officers are an integral component of the criminal justice system, execute important and broad public policy in that area, and perform a vital role in one of the most basic functions of state government.

When the holding is considered in light of the other governmental occupations previously held to justify a citizenship requirement, it is clear that the decision below signals a retreat from the principles enunciated in *Foley* and *Ambach*. The district court's decision if it becomes the established law would create an inexplicable dichotomy in the application of citizenship standards to probation officers and to police and others performing roles in the administration of the criminal justice system such as judges, jurors and public prosecutors. The court's opinion will necessarily serve to confound the law, and inject confusion and error in the application of the *Foley* and *Ambach* criteria in future cases involving public employees.

The decision holding that Government Code § 1031 is unconstitutionally overbroad is erroneous in light of California's statutory scheme which identifies in separate and severable statutes those occupations granted peace office status. The impact of the court's action extends beyond the probation officer position. It also had the effect of striking down an admittedly valid citizenship requirement for police

officers effectuated through the same statute.[1] Moreover, the district court had no jurisdiction to reach its "overbreadth" finding because the plaintiffs, as applicants only for the deputy probation officer position, lacked standing to challenge the statute's application to other categories of peace officers.

I.

Probation Officers in California Are a Class of Public Employees That Can Be Required to Be United States Citizens.

Deputy Probation Officers (hereafter referred to as probation officers)[2] by virtue of their statutory duties perform functions that not only conform to, but actually exceed the threshold criteria recognized by this Court in *Foley* and *Ambach* as justifying a citizenship requirement. The majority below, while recognizing that employment activities which promote civic virtues, serve as role models for members of society, and influence the attitude of the public toward its government and the justice system, are indicia of membership in the political community that may be reserved to citizens, inexplicably ignored these criteria when applied to the probation officer position.

---

[1]Police officers are declared to be peace officers in California's Government Code §830.1, which states in relevant part:

> "Any sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such, of a county, any policeman of a city, . . . is a peace officer."

A citizenship requirement for police officers is imposed in the same manner as for probation officers—through § 1031a by reference to Penal Code § 830.1.

[2]The duties of a deputy probation officer in California are the same as his principal, the Probation Officer, and both are included within the citizenship requirement. (Code of Civil Procedure § 131.4, Penal Code 830.5, Welfare & Institutions Code § 283, Appendix E.)

The majority, in contrasting a probation officer's duties and role with those of teachers and police officers, concluded that this classification of public servants has a "far, far less" effect on the governmental and political process. *Chavez-Salido v. Cabell.* Appendix A at 8. This conclusion is premised on findings that probation officers do not deal with the bulk of the community, do not teach or have a teacher-pupil relationship with probationers, have limited power of arrest, and the exercise of their discretion while broad is less important than a police officer's because it lacks "finality". Appendix A, p. 12.

The courts attempted distinction on these grounds lack substance. While the district court noted that deputy probation officers are generally regarded as a part of the law enforcement apparatus of the community, act as advisors to the court, and have a unique duty to the state (Appendix A, p. 11, note 8), the court ignored the implication of those observations in determining that for citizenship purposes a probation officer is not a part of the political community.

This Court's recent decisions in *Foley v. Connelie*, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978) and *Ambach v. Norwick*, 99 S.Ct. 1589, 60 L.Ed.2d 49 (1979) has clarified the law with regard to citizenship requirements for certain non-elected public positions. The Court upheld a citizenship requirement for police officers in *Foley v. Connelie* and for public school teachers in *Ambach v. Norwick*. In both cases the Court articulated important criteria governing the determination of whether a public service occupation can justifiably be restricted to United States citizens — criteria the district court in this case either ignored or clearly misapplied. In *Foley*, the court held that strict equal protection scrutiny was not required to justify a classification applicable to non-elected positions held by officers who participate directly in the formulation, execution or review of

broad public policy. In those circumstances, the state need only show some rational relationship between the interest sought to be protected and the limiting classification — *Foley, supra*, at 1070. The Court noted that "the right to govern was reserved to citizens" *supra*, at 1071.

The court proceeded to analyze the job in question. Noting that the exercise of police authority called for a high degree of judgment and discretion and that their actions had a serious impact on individuals, the Court concluded that the police officer was in no sense one of the "common occupations of the community and could not be equated with a private person engaged in routine public employment", *supra*, at 1072.

The Court found that police officers very clearly fell within the category of important non-elective officers which could be reserved for citizens. The majority observed that "it would be anomalous to conclude that citizens may be subjected to the broad discretionary powers of non-citizen police officers as it would be to say that judicial officers and jurors with power to judge citizens can be aliens", *supra*, at 1072.

In the context of a citizenship requirement for public school teachers in New York, this Court in *Ambach v. Norwich*, 99 S.Ct. 1589 (1979) restated and applied the rational basis test as follows: "They [referring to the Court's recent decisions] have not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government," *supra*, at 1593.

If citizenship may be required of any teacher or police officer, it should be apparent in light of the role of probation

officers in our criminal justice system and the duties prescribed by the California statutes, that citizenship may also be required of probation officers. Probation Officers perform duties which go to the very heart of a representative government. As an integral component of the nation's law enforcement and criminal justice system, they exercise such broad and influential discretion which daily impacts on the lives of citizens that more compelling reasons support a citizenship requirement for their occupations than for teachers and police officers.

In California and undoubtedly elsewhere a deputy probation officer performs the following broad range of duties.

Probation Officers as peace officers have power of arrest (California Penal Code § 830.5, Welfare and Institutions Code § 283, and Code of Civil Procedure § 131.4) and although not as broad as that of a police officer, they have the general power of arrest within their statutory jurisdiction and may arrest upon suspicion. Violation of probation is cause for immediate rearrest by the probation officer without an arrest warrant (California Penal Code § 1203.2). Probation Officers may take into custody juveniles before and after court proceedings and have important release functions over adult offenders who are placed under their direct supervision. They may order the temporary release of inmates incarcerated in County jails for the purpose of preparing them for release to the community (Penal Code § 1203.1(a)).

Probation Officers play an important role in the criminal justice system through their supervisory responsibility over adult and juvenile offenders. They must insure that all conditions of probation are obeyed (Penal Code § 1203.1), and if they determine that a violation of probation has occurred, it is cause for the immediate arrest of the offender (Penal Code § 1203.2). Deputy Probation Officers supervise out-of-state parolees and must be familiar with, and dedicated

to, the enforcement of not only the law of California but the law of the United States and other States (Uniform out-of-State Parolee Supervision Act, California Penal Code § 11175-11179).

The Probation Officer's relationship with the court is substantial, direct, and an integral part of the criminal justice system. Probation Officers are required to report to the court factors to be considered in aggravation or mitigation of punishments for a crime and whether probation should or should not be granted (Penal Code § 1203). The Probation Officer's review of the circumstances surrounding the offense, his appraisal of the individual's prior record, his assessment of the individual's adaptability to rehabilitation and his recommendations as to sentencing and probation are compelling, if not controlling, factors as to whether a convicted person will be incarcerated and how long, or freed on a term of probation. The Probation Officer's court report which considers the social history, the past criminal record, and the current offense of the individual with a view to recommending release or incarceration is based primarily on the probation officer's judgment of what is conducive to the good of the community (Penal Code § 1203.1a).

Probation Officers in California have an extremely important and discretionary role with regard to juvenile offenders and dependent, abandoned or neglected minors. Probation Officers determine whether court proceedings should be instituted against juvenile offenders and whether to release or detain juveniles accused of criminal or delinquent acts (Welfare and Institutions Code §§ 628 and 630). They have a specific statutory responsibility to advise minors of their constitutional rights (Welfare & Institutions Code § 627.5). Probation Officers take custody of juveniles before and after court proceedings, represent the interests of the juvenile in such proceedings, prepare social studies

on the minor and make recommendations for the proper disposition of the case (Welfare and Institutions Code § 280). The care, custody, control and conduct of the minor may be given to the probation officer to supervise as best he sees fit (Welfare and Institutions Code §§ 727, 730, 731).

With regard to neglected, abandoned and abused children, the probation officer's powers are equally broad as he determines whether to file a petition to declare the minor a ward or dependent of the court and appears on behalf of the minor in proceedings against the parents to obtain custody of the child in the child's best interest.[3] In this capacity, probation officers act as a *guardian ad litem* for the juvenile and are responsible for his direct care, custody and control, as well as representing the minor's interests in Dependency Court proceedings (Welfare & Institutions Code § 326). An extremely important function is performed by probation officers in making recommendations to the court for removal of juveniles from the custody of their parents. California Welfare and Institutions Code § 356.

The role of the probation officer in structuring the attitudes of offenders as well as others towards society and in the inculcation of a belief in the need to observe the law is demonstrated by their crime prevention and adult delinquency prevention functions, whether or not probationers are involved. (Penal Code §§ 1203.13, 1203.14; Welfare and Institutions Code § 236.) In this role the probation officer deals with all adults and juveniles in the community. The probation officer, in effect, teaches individuals to be good citizens.

---

[3]California Welfare & Institutions Code §§ 300, 305, 309, 325 and 326.

Although in a very general sense the personal contacts arising from performance of a probation officer's duties may be narrower than a police officer's, the impact of their performance extends far beyond the immediate relationship between the probationer and the offender and has tremendous consequences for the American public as a whole. How well the probation officer performs his manifold tasks has vital consequences on the efficiency of the criminal justice system, how it is perceived by the public, and how well the offender is rehabilitated and assimilated into lawful society.

The size of the population a public servant deals with on a daily or routine basis is too truncated and indeed a misleading criteria for determining whether the position in question is within the category of important non-elective officers who participate in the execution of broad public policy. There are many occupations with similar characteristics that without question may properly be reserved to citizens. Trial judges, public prosecutors and jurors are relevant examples. Their immediate contact is with that narrow segment of society charged with an offense or who appear for judgment. Yet the overall role of these individuals when judged in light of their ultimate impact on our society is great. So also is the case with probation officers.

There can be no question that probation officers are directly involved in the execution of the broad public policy relative to our criminal justice system and the rehabilitation of public offenders. Probation officers are an integral and important part of the nation's law enforcement and criminal justice system — they are an essential component and partner in the law enforcement team which includes the police, the prosecutors and the courts.

The district court similarly erred in concluding that a probation officer's exercise of discretion was far less im-

portant than a police officer is because it lacked finality. The significance of "finality" is unclear as in our system of government there are very few public employees or officers whose acts can be considered "final" in any sense meaningful to the central issue herein. A police officer initiates the criminal proceedings by arrest but his role generally concludes with his testimony, if any. The term in custody of an individual arrested by a police officer pending a court hearing can be just as short as the detention of a juvenile offender by a probation officer.

The probation officer, who in many instances may initiate an arrest or revocation of probation, plays many roles before, during and after the sentencing. In a great many cases his influence continues for years after the formal judicial proceeding and when the arresting officer, the jurors and prosecuting attorney are no longer involved. We rely under our system of criminal justice primarily upon the probation officer to inculate in the offender those fundamental values and the observance of the norms of behavior and social responsibility that are necessary in a society governed by the rule of law.

The probation officer exercises great and very consequential discretion as the court's advisor on sentencing, methods of rehabilitation, the conditions and length of probation and possible revocation of probation and reincarceration. As noted earlier, a probation officer's responsibilities with regard to juveniles is broad and pervasive and in many respects has a greater long-range impact on how the juvenile ultimately relates to society than is the case with adults.

In *Foley*, this Court remarked that it would be anomalous for citizens to be subject to the broad discretionary powers of non-citizen police officers. The same observation is true of probation officers for they complete and execute the actions initially commenced by a citizen police officer and

continued on by citizen prosecutors, judges and jurors. Citizenship may properly be required as a condition for appointment as a deputy probation officer in California.

II.

A Statute Which Provides That "Each Class of Public Officers or Employees Declared by Law to Be Peace Officers" Shall Be a Citizen of the United States Is Not Constitutionally Overbroad When a Separate Companion Statute Specifies That Probation Officers Shall Be Peace Officers.

Unlike the statute and found constitutionally offensive in *Sugarman v. Dougall*, 413 U.S. 634, 635 (1973), the California statute does not declare that all civil servants must be U.S. citizens. The California statute struck down as unconstitutional provides in a much narrower fashion that "public officers declared by law to be peace officers" shall be U.S. citizens. The California legislature in a separate statute (Penal Code § 830.5) declared that probation officers are to be considered peace officers. On its face § 1031a simply cannot be enforced without consideration of companion statutes and it is this characteristic that clearly distinguishes the *Sugarman* case. Those public positions granted peace officer status are identified in severable and separate California statutes, permitting no unrestrained discretion in the public employer in requiring citizenship as a condition of employment, and allowing each job class to be separately evaluated as to the justification for a citizenship requirement.

The original decision of the three-judge district court ordered vacated by this Court declared § 1031a unconstitutional on grounds of overbreadth. In reaffirming their original decision, the majority relied solely and unjustifiably upon the *Sugarman* case, which is clearly distinguishable

on its facts and ignored this Court's guidance in *United States v. Raines*, 362 U.S. 17 (1960) and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). We believe that dissent below properly applied the *Raines* and *Broadrick* criteria to the facts of the instant case.

In defining the role of the federal courts in declaring statutes unconstitutional this Court observed in *Raines, supra* at 20-21:

> "In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. *United States v. Wurzbach*, 200 U.S. 396; *Heald v. District of Columbia*, 259 U.S. 114, 123; *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217; *Collins v. Texas*, 223 U.S. 288, 295-296; *New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160-161. Cf. *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 537; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513; *Virginian R. Co. v. System Federation*, 300 U.S. 515, 558, 1 LRRM 743; *Blackmer v. United States*, 284 U.S. 421, 442; *Roberts & Schaefer Co. v. Emmerson*, 271 U.S. 50, 54-55; *Jeffrey Mfg. Co. v. Blagg*, 235 ULS. 571, 576; *Tyler v. Judges of the Court of Registration*, 179 U.S. 405; *Ashwander v. TVA*, 297 U.S. 288, 347-348; (concurring opinion)."

The same rule was followed in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), when the Court said at 610:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g., *Austin v. The Aldermen*, 7. Wall. 694, 698-699 (1869); *Supervisors v. Stanley*, 105 U.S. 305, 311-315 (1882); *Hatch v. Reardon*, 204 U.S. 152, 160-161 (1907); *Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-220 (1912); *United States v. Wurzbach*, supra, at 399; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513 (1937); *United States v. Raines*, 362 U.S. 17 (1960)."

After enumerating the exceptional situations in which the standing has been allowed, the Court said:

> "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. See *Dombrowski v. Pfister*, 380 U.S., at 491; *Cox v. New Hampshire*, 312 U.S. 569 (1941); *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971); cf. *Breard v. Alexandria*, 341 U.S. 622 (1951)."

413 U.S. at 613.

As correctly noted in the dissent, the overbreadth doctrine has been applied primarily in first amendment cases. In those cases the Court could not have decided the case on a narrower basis because even if some behavior or occupation could constitutionally be restricted, the challenged statute was so broad in its terms that there would still remain

the risk of unbridled scope and discretion in its application. In first amendment cases this is a matter of particular constitutional concern because restraints on first amendment rights are justified only under the most compelling circumstances and this Court has continually condemned actions that have an unnecessary chilling effect on the exercise of those rights.

No such factors are present with regard to California's citizenship requirement for probation officers. The *Sugarman* case relied upon by the majority is clearly distinguishable as the New York Statute totally failed to restrict the citizenship requirement to any particular occupation within the extremely broad category of civil service positions. Even if under the broad civil service umbrella, there existed occupations that could justifiably be restricted to citizens (such as police officers) the New York statute simply did not identify them.

The effect of the California statute is to the contrary. The California statutes, although including a great many different occupational categories, are fundamentally different in application as the dissent observed. "[E]ach of these categories are defined with such narrowness and precision as will permit the application of constitutional principles on any category challenged. It is difficult to see how the occupation of probation officer could be more clearly defined". *Chavez-Salido v. Cabell*, ... F.2d .... , 23 FEP Cases at 112, Appendix A, p. 18.

This Court had no difficulty in ascertaining that Section 1031a can be applied narrowly for it noted in its opinion in *Foley v. Connelie*, that by virtue of § 1031, California was one of 24 states besides New York that "specifically require United States citizenship as a prerequisite for becoming a member of a statewide law enforcement agency", *supra* at 1072, note 8. (Emphasis added)

Placing the "overbreadth" factor into perspective, is there any real constitutional difference between a series of independent and separate statutes each defining an occupation and specifying a citizenship requirement and a statute that imposes a citizenship requirement by reference to other statutes, each of which separately identify the affected occupations? We believe not and that the district court misapplied the constitutional "overbreadth" doctrine under the facts of this case and unfortunately, regardless of the merits relating to the probation officer position, unnecessarily eliminated, a valid citizenship requirement for police officers in the State of California.[4]

III.

Plaintiffs Have No Standing.

All of the plaintiffs in this case were applicants for only one class of position, deputy probation officer. There were no plaintiff applicants for any of the remaining classes of public positions granted peace officer status under other separate statutes. Being totally unaffected by the application of Section 1031a to these other job classifications, plaintiffs lacked standing to assert that Section 1031a was overbroad because it included some categories, which upon careful analysis and with an aggrieved party might be found not to justify a citizenship restriction.

---

[4]Penal Code § 830.1 declares that "Any sheriff, undersheriff, or deputy sheriff . . ., any policeman of a city . . . is a peace officer." Pursuant to Government Code § 1031a now declared unconstitutional, these law enforcement officers were required to be U.S. citizens.

Conclusion.

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

DATED: December 16, 1980.

JOHN H. LARSON, County Counsel,

By WILLIAM F. STEWART,

Chief Labor Relations Division,

Attorneys for Appellants.

APPENDICES

APPENDIX A.

Opinion.

CHAVEZ-SALIDO v. CABELL

U.S. District Court
Central District of California

CHAVEZ-SALIDO, et al. v. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County, et al., and the COUNTY OF LOS ANGELES, No. CV 76-0541-IH, June 4, 1980

Full Text of Opinion

HILL, Chief Judge: — In an opinion filed February 3, 1977, and published at 427 F.Supp. 158, 17 FEP Cases 646 (C.D. Cal. 1977), this Court declared unconstitutional California Government Code Section 1031(a). That section provides that one must be a citizen of the United States to be a peace officer or to occupy any governmental position, state, county or local, which is declared by law to have the powers of a peace officer. Plaintiffs in the case are three non-citizens, each of whom sought employment by Defendant Los Angeles County as a Deputy Probation Officer II and was refused employment solely because of the citizenship requirement of the statute.

This Court's decision was appealed to the United States Supreme Court. In an order dated May 15, 1978, the judgment of this Court was vacated and the case was remanded to this Court "for further consideration in light of Foley v. Connelie, 435 U.S. 291, 17 FEP Cases 1 (1978)." 436 U.S. 901, 17 FEP Cases 699 (1978). The matter was rebriefed and was reargued on December 8, 1979.

The facts are fully set forth in the original opinion of this Court and do not need repetition here. We likewise will not repeat herein the jurisdictional discussion of the original

opinion, which we readopt.[1] In the footnote[2] we discuss the few inconsequential factual changes occurring since the original opinion was filed.

We recognize that the views of the Supreme Court with respect to the general problem of citizenship being required for employment by state and local government agencies, have been much more fully developed and expounded in two recent cases: Foley v. Connelie, supra and Ambach v. Norwick, 441 U.S. 68, 19 FEP Cases 467 (1979).[3]

Applying the newly developed principles enunciated in Foley and Ambach, we have reached the same result as we reached before. We again hold that Section 1031(a) is unconstitutional. We reach this same result on the same

---

[1]At the second argument, counsel for Plaintiffs asked to be relieved of their prior action in which they voluntarily waived any claim against the County under 42 U.S.C. Section 1983. They point to the intervening opinion of the Supreme Court in Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 17 FEP Cases 873 (1978), as having changed the previous law. As we understand their papers, defendants do not dispute the County's Section 1983 liability under Monell. At this late date, we decline to relieve counsel of their previous waiver, noting that under our previous holding the County is amenable to suit under Section 1981 and that a Section 1983 remedy would be cumulative at best.

[2]As to the functions and powers of probation officers, the parties stipulated that probation officers in California are not authorized to carry weapons. In addition, this Court took judicial notice of certain sections of California law defining the powers and functions of probation officers, which sections were not mentioned in the previous opinion. i.e., Code of Civil Procedure Section 131.3 et seq.; Penal Code Section 1203 et seq.; Welfare and Institutions Code Section 280-83, 727 et seq. We do not regard any of these sections as working any material change in the description of the duties of probation officers as contained in the original opinion.

The Court was also informed that since the publication of its original opinion, Plaintiff Chavez-Salido has left County employment altogether and no longer seeks injunctive relief with reference to appointment. However, his case is not rendered moot by that fact since his prayers for back pay and attorneys fees remain viable.

[3]The Supreme Court has also spoken on the same subject in Nyquist v. Mauclet, 432 U.S. 1 (1977), but we do not regard that opinion as of importance for our purposes.

grounds as before: 1) the statute is overbroad and 2) the statute as applied denies these plaintiffs the equal protection of the law.

I.

OVERBREADTH

In our original opinion, we discussed the status of alienage under the equal protection clause as enunciated by the Supreme Court. We believe that discussion remains valid today. Nothing in the intervening opinions of the Supreme Court would in our view undermine the proposition that citizenship may be required for governmental employment only by a statute which is "narrowly drawn" and which does not sweep "too broadly."

Footnote 5 of the Foley opinion, 435 U.S. at 296, 17 FEP Cases at 3, reaffirms the continued validity of the overbreadth criterion in the following language:

> "This is not to say, of course, that a State may accomplish this end with a citizenship restriction that 'sweeps indiscriminately', [citing Sugarman] without regard for the differences in the positions involved."

In Foley, the statute requiring citizenship was narrowly drawn. It applied only to members of the New York State Police force, "State Troopers." In Norwick the statute was likewise narrowly drawn. It applied only to persons who are employed "to teach in the public schools" of the state. It is noteworthy that the New York statute involved in Norwick did not confine employment as teachers to those who had their citizenship, but permitted the employment of noncitizens who had "made application" to become citizens. The California statute with which we deal permits the employment only of persons who are already citizens and, as we pointed out in our original opinion, covers a whole host

of other occupations to which the requirement of citizenship cannot be reasonably related.

We read the new decisions of the Supreme Court as continuing to emphasize that the legislature must make a reasoned judgment as to each occupation in the field of public employment for which it requires citizenship as a prerequisite. The Court's opinions seem to require that the legislature should examine the functions, duties and responsibilities of various public jobs, position by position, and determine for each that the job is so necessarily involved with the essential power of government that it should be confined to citizens.

[CALIFORNIA ENACTMENTS]

If these are the requirements, the legislative action of the California legislature with which we are concerned does not meet them. The California legislature has for over one hundred twenty five years dealt with the subject of who is a peace officer and who, additionally, is deemed to have the powers of a peace officer. The first enactments in this field appear to go back to 1851.[4] In dozens of subsequent enactments, the legislature had added one or more public positions to the list. Until 1961, all the repeated additions to the list of peace officers were enacted without any requirement that people holding these positions should be citizens.[5] Then in 1961, in one fell swoop, the legislature passed Government Code Section 1031 which applied the mandatory citizenship requirement to all of the positions on

---

[4]See Hetherington v. Cal. State Personnel Board, 82 Cal. App. 3d 582, 172 Cal. Rptr. 300, 309 (1978) (Reynoso J., dissenting). Originally, only four positions were granted peace officer status: sheriff, policeman, marshal, and constable. Id.

[5]We note that the California Attorney General found no pre-1961 citizenship requirements for peace officers in his study of this matter. See Opinion No. 69-199, 53 A.G.Op. 63, 68 (1970).

the list. We are cited no legislative history or legislative findings which supply any basis or rationale for this broad new citizenship requirement.

In Footnote 22 of our prior opinion, we set forth the extensive list of positions covered by the California citizenship requirement of Section 1031(a). It is to be remembered that state, county and local employees are all included if they are within any of the occupational categories on the list. We believe that Section 1031(a) is void as a law requiring citizenship which "sweeps too broadly" under the Court's original holding in Sugarman and the recent Footnote 5 in Foley. There appears to be no justification whatever for excluding aliens, even those who have applied for citizenship, from holding public employment as cemetery sextons, furniture and bedding inspectors, livestock identification inspectors and toll service employees.[6] Yet all

---

[6]We note that since the publication of our original opinion, the California legislature has added a substantial number of other positions to the list appearing as Footnote 22 of the original opinion and has deleted a few positions from that list. In the interest of accuracy, the changes are hereinafter specified:

Under Section 830.1

Add: Inspectors and Investigators in Offices of District Attorney

Under Section 830.2

Add: Bay Area Rapid Transit District officers

Under Section 830.3

Add: Narcotics agents of the Department of Justice

Add: Investigators of the State Department of Health

Delete: District Attorney investigators

Delete: "members of a fire department"

Under Section 830.31

Add: Marshals and police appointed by the Director of Parks and Recreation

Under Section 830.35

Add: Policemen of the San Francisco Port Commission

Under Section 830.36

Add: Police officers appointed by the Bethel Island Municipal Improvement District

these are within the proscription of Section 1031(a) along with probation officers.

As will be discussed more fully in part II, infra, certain positions within the "political community" are subject to a less stringent equal protection scrutiny than those positions not within the "political community." For the purposes of this overbreadth analysis, it suffices to say that cemetery sextons, toll collectors, and persons in many other occupations within Section 1031(a) cannot be considered members of the political community no matter how liberally that category is viewed.

Thus, nothing has changed which would alter our original conclusion: Section 1031(a) is grossly overbroad and sweeps much too broadly in its proscription of alien employment.

Under Section 830.4

Add: Airport security officers of the City of Palm Springs

Add: Transit police officers of the Southern California Rapid Transit District

Under Section 830.10

Add: County coroners and deputy coroners

Under Section 830.11

Add: Welfare fraud investigators or inspectors, if designated by local ordinance

Under powers of peace officers:

Delete: The director, officers and employees of the Division of Aeronautics (Public Utilities Code Section 21252)

Delete: Any person vested with the power of enforcing any provisions of the Agriculture Code (Agriculture Code [now Food & Agriculture Code] Section 7)

Delete: Inspectors of the Bureau of Livestock Identification (Agriculture Code [now Food & Agriculture Code] Section 24032)

Delete: Officers and employees of the state park system (Public Resources Code Section 5007)

Delete: Sealers of the Department of Weights and Measures (Business and Professions Code Section 12013).

II.

THE STATUTE AS APPLIED

In their rebriefing and reargument, defendants again urge us to restrict our examination only to the validity of the statute as applied to deputy probation officers.[7] Defendants have pointed to nothing in the recent opinions of the Supreme Court which would justify such a limited examination. So we again observe that the decisions of the Supreme Court appear to rule out consideration of such a statute as applied. We again determine that the scrutiny to be afforded a statute of this kind must include an examination of whether it is too broad in its scope. This is the approach which the Supreme Court itself undertook in Sugarman, and, as indicated by the footnote in Foley, remains the proper approach to this day. But, out of an abundance of caution, we have again proceeded to examine Section 1031(a) as applied. We again hold the statute to be unconstitutional as applied to deputy probation officers as their functions and powers are defined in California law.

This examination of the statute as applied requires us to determine whether deputy probation officers fall within the group of public service positions which the states and local governments may reserve for American citizens. That group of positions was originally described in Sugarman as in-

---

[7]Defendants at the reargument made a contention not previously advanced by them, i.e., that these plaintiffs are confined to challenging the validity of Section 1031(a) only as it applies to probation officers, and have no standing to challenge the validity of the statute as it applies to other occupations. We reject this contention. Under standard equal protection analyses, and under the explicit approach of the Supreme Court in Sugarman, where there is a suspect classification, i.e., noncitizens, anyone affected by the statute would appear to have standing to challenge the statute on overbreadth grounds. This argument is really no different from that defendants made with respect to overbreadth, and we reject it for the same reasons as found in that section of our opinion.

volving "members of the political community". The characteristics of positions which fall within the group have been more fully expounded in Norwick and Foley.

[NORWICK CASE]

In Norwick, which held that school teachers are within the political community, the Court appears to rest the decision upon the important policy and governmental functions which public school teachers perform. The Court specifically relied on the importance of public education in our society, 441 U.S. at 76-78, and noted that the function of a schoolteacher is of paramount importance because it includes promoting civic virtues, serving as a role model and influencing the students' attitudes towards government and the political process, id. at 78-80.

We find no difficulty in holding that the function of deputy probation officers is substantially distinguishable. Probation officers do not deal with the bulk of the community. They perform none of the school teaching functions with respect either to children or adults. The relationship of probation officers to those under their supervision is far different from the relationship of a public school teacher to his pupils. The effect of probation officers on the governmental and political process is, we believe, far, far less.

In Foley the Court held that New York State Troopers were within the political community. The underlying reason was expressed as follows:

> "[I]t is because this country entrusts many of its most important responsibilities to these officers . . . [I]t represents the choice, and right, of the people to be governed by their citizen peers. To effectuate this result, we must necessarily examine each position in question to determine whether it involves discretionary decision-making, or execution of policy, which substantially

affects members of the political community." 435 U.S. at 296, 17 FEP Cases at 3.

The role of the State Troopers was also described in Foley as one involving "a very high degree of judgment and discretion, the abuse and misuse of which can have serious impact on individuals," 435 U.S. at 298, and as a person who is "vested with . . . plenary discretionary powers." Id.

Both State Troopers and deputy probation officers are generally regarded as being part of the law enforcement apparatus of the community. We have carefully compared the powers and duties of both with particular reference to the above quoted language. In so doing, we have, as required by the teachings of the Supreme Court, given great weight and respect to the determination of the state legislature in requiring citizenship as a condition of employment. But we have nevertheless concluded that the positions are vastly different and that a constitutionally permissible basis does not exist for such a citizenship requirement for deputy probation officers.

The Foley opinion, in describing the role of the State Trooper, emphasizes that he is involved in formulating and executing broad public policy, that he deals with the whole community, and that his actions immediately affect the lives of citizens in all walks of life. It also emphasizes that he is "clothed with authority to exercise an almost infinite variety of discretionary powers." 435 U.S. at 297.

We contrast this with the role of a probation officer in California. In the original opinion we described the probation officer's powers and duties in the following language:

> "Deputy probation officers in California perform a wide range of duties. They include preparation of presentence investigations and recommendations as to sentence, supervision of probationers (including efforts to

ameliorate their employment, health and family problems) and investigation of probation violations. Also included are various duties in connection with juveniles and juvenile courts among which are the filing of juvenile court petitions charging both delinquency and illegal acts, presence at juvenile court hearings in an advisory capacity, placement of minors declared to be wards of the juvenile court and supervising custodial personnel in juvenile incarceration institutions."

For the purposes of this remand, we have given even more careful and detailed consideration to those powers and duties.

No single section of California law spells out in detail all or substantially all of the duties of a probation officer. Bits and pieces of his powers are found in a number of statutes. Some of them may be thought to involve wide and important discretion and authority. For example, a probation officer may arrest a probationer believed to have violated the terms of his probation for the purpose of bringing the probationer before a court. The Court may thereafter, in its discretion, issue a warrant permitting further detention. Penal Code Section 1203.2(a). This limited power of arrest contrasts sharply with the general powers of arrest possessed by State Troopers and even ordinary policemen.

With respect to juveniles, a probation officer, under California Welfare and Institutions Code Section 628, acts as the custodian of a juvenile taken into custody by the police. After making an investigation, the probation officer has the discretion either to release the juvenile to his parents or retain him in custody. The custody will be only for a very short period pending a court hearing. The essential decision

on the subject of custody is thus a judicial one in which the probation officer is but an advisor to the court.[8]

In Foley the Court described State Troopers as exercising the functions traditionally associated with peace officers, i.e. the prevention and detection of crime, apprehension of suspected criminals, execution of warrants, search and seizure for arrest, and the carrying of weapons, 435 U.S. at 293. A California probation officer cannot be said to perform any of those functions except perhaps a limited power of arrest.

Whereas California law gives policemen the many powers mentioned above (Penal Code Section 830.1), the section which confers the status of peace officers on California probation officers (Penal Code Section 830.5) contains words of extreme limitation on the powers of the latter. We read the relevant sections of the Penal Code as allowing a probation officer to act like a policeman only in enforcing compliance by a probationer of the conditions of his pro-

---

[8]The Supreme Court has recently considered the role of a California probation officer in the Fare v. Michael C. 442 U.S. 707 (1979). In that case the question before the Court concerned a minor who, during interrogation by the police, had asked to see a probation officer who had supervised him in other juvenile court problems. No meeting with the probation officer was arranged and the interrogation continued. In the interrogation, the juvenile made damaging admissions which he sought to suppress from the juvenile court proceedings on the ground that the Miranda rule had been violated. The California Supreme Court had upheld the juvenile's contention and likened the function of a probation officer to that of an attorney; a request to see an attorney would require an end to all questioning. The Supreme Court reversed, pointing out that a probation officer has no specialized legal training and has a duty of loyalty to the state, under which he could not withhold, from the police or the courts, facts made known to him by the juvenile as to a crime then under investigation. The undisputed existence of a probation officer's duties to the state for this purpose does not in our view make the probation officer the equivalent of a policeman. The opinion of the Court was directed to matters other than the governmental function exception in the field of alienage with which we are dealing in this case.

bation and in the transportation of a probationer.[9] Moreover, as we point out in Footnote 1, supra, the California legislature does not allow probation officers to carry weapons, which right is indispensable to the function of State Troopers, policemen, and others truly having the powers of a peace officer.

When the functions and powers of a California probation officer are compared side by side with those of a New York State Trooper or any other policeman, the differences are noteworthy. The probation officer's position involves some discretion to be sure, but the discretion is far less important than the policeman's since the probation officer's decisions lack finality and are made advisory to and under the supervision of a judicial officer.

Thus, a probation officer's duties involve substantially less discretion and responsibility than either a schoolteacher's or a policeman's. Just as important is the impact of each employee on the public at large. Public schoolteachers see a great majority of children and are with them many hours of each day through their formative years. Policemen deal with the entire community. Probation officers, on the other hand, deal only with a limited number of persons who have had prior adverse contact with the judicial system. Thus, in terms of the breadth of their constituency and the width of the group they serve, there is in our view

---

[9]Section 830.5 encompasses the recognition of both probation officers and state parole officers as peace officers. Probation officers are appointed by the county, while parole officers are employed by the State Department of Corrections. We read Section 830.5(a)(2), authorizing action in connection with the escape of any inmate from a state institution, to be applicable to parole officers only, and we also read Section 830.5(a)(1) where it refers to parolees to be describing only the authority of parole officers. A contrary interpretation would not in any way change today's result.

a vast distinction between public schoolteachers and policemen on the one hand and probation officers on the other.

For the reasons stated above, we hold that the position of deputy probation officer is not within the political community. Therefore, we must apply the strict scrutiny standard and determine if a compelling state interest exists. In so doing, we reach the same result as we reached in the original opinion and hold that citizenship may not be required for the position of Deputy Probation Officer.

III.

RELIEF

In view of our reaching the same result as reached in the original opinion, the relief decreed will be the same except that the injunctive relief will not be applicable to Plaintiff Chavez-Salido. See Footnote 2, supra. We note that the single judge to whom the case was originally assigned, Judge Hill, awarded attorneys fees to the Plaintiffs. We ratify that award and authorize him to award such further attorneys fees in connection with the appeal, remand, rebriefing, and reargument as he deems appropriate. We also authorize the single judge, Judge Hill, to sign and file a final judgment in the case. Counsel for Plaintiffs will prepare and submit a proposed final judgment within 10 days. If the form of the proposed final judgment is not approved by defense counsel, the latter will have 10 days further in which to file written objections which will not change the result.

Judge Pregerson concurs in this opinion.

DISSENTING OPINION.

CURTIS, Senior District Judge, dissenting: — In our first opinion filed February 3, 1977, we declared section 1031(a) of the California Government Code unconstitutional (1) as overbroad, and (2) in violation of the Equal Protection Clause as applied to the plaintiffs herein. Upon appeal, the Supreme Court has remanded the case "for further consideration in the light of Foley v. Connelie, 435 U.S. 291, 17 FEP Cases 1 (1978)."

I.

FACIAL OVERBREADTH CHALLENGE

Since Foley does not touch on the issue of "overbreadth", if the Supreme Court had accepted our holding on this issue, I would think it would have simply affirmed our decision, at least upon the issue of overbreadth, and that would have been the end of the matter.

But, since it did not do so, and upon remand directs our attention to the issues with which Foley was concerned and no others, I can only conclude that the Supreme Court did not agree with our holding on the issue of overbreadth.

Furthermore, it seems clear to me that plaintiffs would have no standing to challenge the statute as overbroad merely because it included categories of persons not before the court to which plaintiffs did not belong, but as to which the application of the statute might produce an unconstitutional result.

In support of my position I rely upon the Court's statement in United States v. Raines, 362 U.S. 17, 20-21 (1960):

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases

and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. United States v. Wurzbach, 280 U.S. 396; Heald v. District of Columbia, 259 U.S. 114, 123; Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217; Collins v. Texas, 223 U.S. 288, 295-296; New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160-161. Cf. Voeller v. Neilston Warehouse Co., 311 U.S. 531, 537; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513; Virginia R. Co. v. System Federation, 300 U.S. 515, 558, 1 LRRM 743; Blackmer v. United States, 284 U.S. 421, 442; Roberts & Schaefer Co. v. Emmerson, 271 U.S. 50, 54-55; Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576; Tyler v. Judges of the Court of Registration,

and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. United States v. Wurzbach, 280 U.S. 396; Heald v. District of Columbia, 259 U.S. 114, 123; Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217; Collins v. Texas, 223 U.S. 288, 295-296; New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160-161. Cf. Voeller v. Neilston Warehouse Co., 311 U.S. 531, 537; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513; Virginia R. Co. v. System Federation. 300 U.S. 515, 558, 1 LRRM 743; Blackmer v. United States, 284 U.S. 421, 442; Roberts & Schaefer Co. v. Emmerson, 271 U.S. 50, 54-55; Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576; Tyler v. Judges of the Court of Registration,

179 U.S. 405; Ashwander v. TVA, 297 U.S. 288, 347-348 (concurring opinion)."

The same rule was followed in Broadrick v. Oklahoma, 413 U.S. 601 (1973), when the Court said at 610:

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g., Austin v. The Aldermen, 7 Wall. 694, 698-699 (1869); Supervisors v. Stanley, 105 U.S. 305, 311-315 (1882); Hatch v. Reardon, 204 U.S. 152, 160-161 (1907); Yazoo & M.V.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-220 (1912); United States v. Wurzbach, supra, at 399; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513 (1937); United States v. Raines, 362 U.S. 17 (1960)."

It is true that the Court has recognized some limited exceptions to this rule, but only "because of the most 'weighty countervailing policies.' " Broadrick, supra, at 611, citing Raines, supra, at 22-23. Such exceptions have been applied in most instances to cases in which a holding of unconstitutionality on only one aspect of the statute might have an impact upon persons who are not parties to the action, and who would have no effective avenue of preserving their rights themselves. An exception perhaps most often followed is where courts have been inclined to depart to some extent from traditional rules of standing so as to permit attacks on overly broad statutes affecting speech and expression which, unless stricken in their entirety, might remain as a threat or deterrent to constitutionally protected expression.

After enumerating the exceptional situations in which the standing has been allowed, the Court said:

> "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. See, Dombrowski v. Pfister, 380 U.S. at 491; Cox v. New Hampshire, 312 U.S. 569 (1941); United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); cf. Breard v. Alexandria, 341 U.S. 622 (1951)."

413 U.S. at 613.

In any event, none of the exceptions pointed out in Broadrick or Raines are applicable in construing section 1031(a), and I would therefore, in reliance upon this rule, deny plaintiffs' standing in this action.

The majority bases its holding of overbreadth upon the concept that the statute "sweeps too broadly" in that it includes occupational categories as to which the application of the citizenship requirement would be clearly unconstitutional. In doing so, it relies upon Sugarman v. Dougall, 413 U.S. 634, 635, 5 FEP Cases 1152 (1973), in which the Supreme Court struck down section 53 of the New York Civil Service Law which provided, "no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States." The Court in Sugarman recognized the right of the state to exclude non-citizens in occupational categories whose members participate directly in the formation and execution of government policy, but held that section 53 was so imprecisely and broadly drawn as to include "many positions with respect to which the State's proffered justification has little, if any, relationship." 413 U.S. at 642.

By way of explaining its decision, the Court said:

> "While we rule that §53 is unconstitutional, we do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee. We hold only that a *flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.*
>
> . . .
>
> Neither do we hold that a State may not, in an *appropriately defined class of positions,* require citizenship as a qualification for office."

413 U.S. at 646-47, 5 FEP Cases at 1157 (emphasis added).

The California and New York statutes are clearly distinguishable. The Court found the New York statute to be overbroad because of its failure to define the occupational categories which the state legislature wished to reserve for citizens with that degree of narrowness and precision necessary in order to distinguish between those to whom the statute could be constitutionally applied from those as to whom the statute could not be so applied. The California statute, on the other hand, although it includes a great many different occupational categories, each of these categories are defined with such narrowness and precision as will permit the application of constitutional principles on any category challenged. It is difficult to see how the occupation of probation officer[10] could be more clearly defined.

---

[10]Since the duties of a deputy probation officer are the same as a "probation officer" I make no distinction between the two in this opinion.

I would hold therefore that section 1031(a) of the California Government Code should be upheld as against an attack for overbreadth.

II.

VALIDITY AS APPLIED

Although the Courts have held that state classifications based on alienage are, for purposes of equal protection analysis, "inherently suspect and subject to close judicial scrutiny." (Graham v. Richardson, 403 U.S. 365, 372 (1971)), in Foley the Court created a significant exception where certain governmental functions are involved.

> "The individual, [upon becoming a citizen], belongs to the polity and is entitled to participate in the processes of democratic decision-making. Accordingly, we have recognized 'a State's historical power to exclude aliens from participation in its democratic political institutions.' [Sugarman v. Dougall, 413 U.S. 634, 648, 5 FEP Cases 1152 (1973)], as part of the sovereign's obligation ' "to preserve the basic conception of a political community." ' 413 U.S., at 647, 5 FEP Class at 1157.
>
> The practical consequence of this theory is that 'our scrutiny will not be so demanding where we deal with matters firmly within a State's constitutional prerogatives.' [Sugarman], supra, at 648, 5 FEP Cases at 1157. The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."

435 U.S. at 295-96, 17 FEP Cases at 2-3.

In Ambach v. Norwick, 441 U.S. 68, 19 FEP Cases 467 (1979), decided after Foley and subsequent to remand of the instant case, the Foley holding was further clarified. Said the Court:

> "The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."

441 U.S. at 75, 19 FEP Cases at 470.

Governmental Function Test.

After discussing the limited right of a state to require citizenship for certain positions, the Court provided the following guidelines for determining the applicability of the Foley exception to strict scrutiny analysis:

> "[W]e must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."

435 U.S. at 296, 17 FEP Cases at 3.

In Ambach, which involved a challenge to a citizenship requirement for teaching in the public schools, the Court further developed the governmental function test:

> "In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role."

441 U.S. at 75, 19 FEP Cases at 470.

Therefore, in determining whether the strict scrutiny or rational basis analysis should be applied, this court must apply the governmental function test to determine: (1) the degree of discretionary decisionmaking afforded probation officers under the system, and (2) the role of the probation system in the governmental structure.

In Foley, the Court was confronted with a New York State statute requiring New York State Troopers to be citizens. The Court upheld the statute's citizenship requirement on the ground that such a trooper was a member of the State Police Force, a law enforcement body which exercises broad police authority throughout the state. After discussing in some detail the varying duties which the police are called upon to perform, the Court states:

> "Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact upon individuals."

435 U.S. at 298, 17 FEP Cases at 4.

Both the Supreme Court of the United States and the Supreme Court of the State of California have recognized the very high degree of discretion and responsibility required of a probation officer in the performance of his duties. In Gagnon v. Scarpelli, 411 U.S. 778, 784 (1973), the Court said:

> "Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation."

In In re Wayne H., 24 Cal.3d, 595, 601, 156 Cal.Rptr. 344, 596 P.2d 1 (1979)[11] the Supreme Court of the State of California, in discussing the responsibilities of a pro-

---

[11]Although the Fare v. Michael C., 442 U.S. 707 (1979) opinion places portions of the California Supreme Court's opinion in In re Wayne H. in doubt, the portion dealing with the responsibilities and discretionary powers of the probation officer are in no way affected.

bation officer while conducting a juvenile investigation to determine whether the juvenile should be further detained, said:

> "While the purposes of such an interview are relatively restricted, however, the latitude given the probation officer in reaching a detention decision, and the effect of that decision on the minor, are substantial."

Probably the most sensitive area in which police officers and probation officers are both called upon to exercise discretion and judgment is in the making of arrests of individuals in appropriate cases. Any arrest by whomever made is a major intrusion upon the life of the victim and the entrusting of the power and discretion upon a public officer to make or withhold an arrest is a matter of the highest concern to the state. While it is true a police officer deals with a broad segment of the citizenry, whereas a probation officer deals with a very narrow segment of the population, an arrest by a probation officer requires no less a degree of judgment or discretion than an arrest by a police officer. Any abuse or misuse of such power by either can have just as severe an impact on the individual arrested and upon society at large.

I would find no difficulty in holding that the duties of a probation officer involves a very high degree of discretionary decisionmaking which substantially affects members of the political community.

In Ambach, the Court held that teachers pursuing their role in the public education system fulfill a most fundamental obligation of government to its constituency. 441 U.S. at 78-79. The Court further said in summary:

> "Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities."

Id. at 79, 19 FEP Cases at 471 (footnote omitted).

While a teacher has both the duty and the opportunity on a day-to-day basis to work with a broad segment of school children, a probation officer through his role has the duty and the opportunity by suggestion, supervision, example, and instruction of bringing the same kind of influence to a narrow class of problem individuals, selected because of their antisocial behavior, upon whom the impact of such influence is even more critically needed than by the normal child in the public classroom.

The majority, in distinguishing between the duties of a police officer and a teacher, on the one hand, and a probation officer, on the other, places great reliance upon the fact that policemen and school teachers exercise their discretion and responsibility in a great variety of situations and deal with large segments of the community. In my view, however, the determining factor is not the size of the arena in which the policemen or teachers exercise their judgment and discretion, or the number of times in a given period that they are called upon to exercise such judgment, nor the great variety of occasions upon which they are called to act. What is important is the weight of the impact which these judgments, when made, have upon the process of state government.

Jurors have been held so closely associated with the state's democratic political institutions that these positions may be reserved for citizens. See Perkins v. Smith. 379 F.Supp. 134 (Md. 1974), aff'd, 426 U.S. 913 (1976). Yet, a juror does not confront a broad segment of the citizenry, nor does he exercise a multitude of functions on a great number of occasions. He may only set on one case in a lifetime, but upon this one occasion he serves such a vital part of the state's judicial function that the courts have recognized the state's right to insist that only citizens fill this role.

The probation system, and its probation officers through which it is enforced, play an integral role in the operation of the judicial system. Almost every sentence imposed by any judge upon a criminal offender is fashioned in large measure upon the recommendation of a probation officer. The impact of such recommendations upon the judicial process is only slightly less than the decision made by the judge himself and equates favorably in importance with anything done by a police officer, a teacher or a juror in furthering the governmental function.

Application of the Rational Basis Test

In the light of the foregoing considerations, therefore, I would hold that probation officers come clearly within the "governmental function" principle recognized in Sugarman, Foley and Ambach.

It cannot be disputed that the State of California has a legitimate interest in the efficient operation of a law enforcement system in this state in which a probation officer plays an important part. Since the Constitution only requires that a citizenship requirement applicable to a probation officer bear a rational relationship to a legitimate state interest I would hold that the statute meets the rational test and should be applied.

Accordingly, I dissent.

APPENDIX B.

Final Judgment.

United States District Court, Central District of California.

Jose Chavez-Salido, et al, Plaintiffs, v. County of Los Angeles, et al, Defendants. No. CV 76-0541-IH.

Filed: Aug. 15, 1980.

Entered: Aug. 19, 1980.

In this matter, an order of the Three-Judge District Court denominated "Partial Judgment" was filed on February 23, 1977. The said Partial Judgment was pursuant to an opinion of the three-judge court and was published at 427 F.Supp. 158. Pursuant to authority granted in the said Partial Judgment, District Judge Hill rendered a Final Judgment, which was filed May 27, 1977, and is unpublished. The judgment of the three-judge court of February 23, 1977, was vacated by the Supreme Court and the matter was remanded to the three-judge court for further consideration. 436 U.S. 901 (1978). The said Final Judgment of District Judge Hill was vacated and remanded by the Court of Appeals for the Ninth Circuit by an unpublished order of that court filed May 14, 1979.

Pursuant to the remand of the Supreme Court, the three-judge District Court again heard argument in the matter on December 8, 1979. Appearances before the Three-Judge District Court (and thereafter at hearings of the one-judge court) were: for Plaintiffs, Legal Aid Foundation of Los Angeles by Richard A. Paez, Esq.; for Defendants, John H. Larson, County Counsel, Los Angeles County, by Philip H. Hickok, Deputy County Counsel.

The three-judge court decided the statute in question unconstitutional in a two-judge majority opinion filed June 4, 1980, and published at .... F.Supp. ..... Judge Curtis dissented. The three-judge court authorized Judge Hill to make

findings of fact and conclusions of law on the issue of damages and attorney's fees and to file a final judgment in the matter.

Argument on the matters referred to him for decision was held before Judge Hill on August 1, 1980, and he, on that date, announced findings and conclusions as to the issues referred to him. Such findings and conclusions were rendered orally. A transcript of Judge Hill's remarks on August 1, 1980, shall be filed when produced which shall constitute his said findings and conclusions.

It is appropriate that this final judgment shall now be filed, containing both the orders and judgment of the three-judge court and the orders and judgment of District Judge Hill under authority granted to him by the three-judge court. Since the orders and judgment of the three-judge court are contained in this document, it has been prepared for the signature of both Circuit Judge Pregerson and District Judge Hill, who constitute the majority of said three-judge court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED *by the Three-Judge District Court:*

1. Judgment shall be entered on behalf of Plaintiffs, Jose Chavez-Salido, Ricardo Bohorquez and Pedro Luis Ybarra, and against Defendants, relief as follows:

(a) California Government Code Sec. 1031(a), on its face and as applied to Plaintiffs, was and is in violation of the Fourteenth Amendment to the United States Constitution in that it denies Plaintiffs equal protection of the laws and it is, therefore, void and unenforceable;

(b) The actions of Defendant County of Los Angeles by and through its employees in denying Plaintiffs employment solely because of their alien status was and is in violation of 42 U.S.C. Sec. 1981;

(c) The actions of the individual Defendants and their successors in office in denying Plaintiffs employment solely because of their alien status was and is in violation of 42 U.S.C. Sec. 1983;

(d) Defendant County of Los Angeles and the individual Defendants and their successors in office are hereby permanently enjoined from enforcing and/or applying California Government Code Sec. 1031(a) against Plaintiffs Ricardo Bohorquez and Pedro Luis Ybarra.

2. The request for damages in the form of back pay by Plaintiffs Jose Chavez-Salido and Pedro Luis Ybarra is referred to Chief District Judge Irving Hill for resolution. Chief Judge Hill shall have the authority to enter any further orders and judgment on the issue of damages and other appropriate relief as he deems just and proper in accordance with the three-judge court opinions of February 3, 1977, and June 4, 1980.

3. Plaintiffs' request for attorneys' fees pursuant to 42 U.S.C. Sec. 1988 is also referred for determination to Chief District Judge Irving Hill. He shall have authority to award attorneys' fees in connection with the judgment previously entered in this action, the appeal, remand and rebriefing, and reargument, as he deems appropriate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by *District Judge Irving Hill* under authority granted by the three-judge court:

4. Plaintiffs Jose Chavez-Salido and Pedro Luis Ybarra shall, in addition to the relief granted to them by the three-judge court, recover damages as follows:

(a) Plaintiff Jose Chavez-Salido is awarded damages in the amount of $10,526.47 against Defendant County of Los Angeles;

(b) Plaintiff Pedro Ybarra is awarded damages in the amount of $8,521,42 against Defendant County of Los Angeles.

5. Plaintiff Ricardo Bohorquez is denied damages. However, Defendant County of Los Angeles shall restore Plaintiff Bohorquez to the eligibility list for Deputy Probation Officer II — Spanish-speaking with a score of 90.

6. Pursuant to the provisions of the Civil Rights Attorney's Fees Award Act of 1976, Pub.Law 94-559, 42 U.S.C. Sec. 1988, Plaintiffs' counsel are awarded reasonable attorneys' fees in the amount of $24,572. Said fees shall be paid by Defendant County of Los Angeles.

7. Interest, at the rate of 7% per annum, shall be paid on the award of attorneys' fees and damages from August 4, 1980.

8. The Court shall reserve jurisdiction over this action to allow Plaintiffs' counsel, if appropriate, to move the Court for an award of additional attorneys' fees for time expended on any appeal from this Judgment.

DATED: August 4, 1980.

/s/ HARRY PREGERSON
Harry Pregerson, Judge
U.S. Court of Appeals, 9th Circuit

/s/ IRVING HILL
Irving Hill, Judge
United States District Court

United States District Court Central District of California.

Jose Chavez-Salido, et al, Plaintiff(s), vs County of Los Angeles, et al, Defendant(s). Case Number CV 76-541-IH.

NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that FINAL JUDGMENT in the above entitled case was entered in the docket on Aug 19 1980.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 20(a). If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING.

I, Edward M. Kritzman, Clerk, United States District Court, Central District of California, and not a party to the within action, hereby certify that on Aug 19 1980, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States

Post Office mail box at Los Angeles, California, addressed as follows:

County Counsel
648 Hall of Administration
500 West Temple St.
Los Angeles, Ca. 90012

Richard A. Paez
Western Center on Law and Poverty
1709 West 8th St., Ste 600
Los Angeles, Ca. 90017

EDWARD M. KRITZMAN, Clerk
By R.L. BYER,
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

APPENDIX C.

Notice of Appeal to the Supreme Court of the United States.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiffs, v. Clarence E. Cabell, etc., Defendants. No. CV-76-0541-IH.

Filed: Oct. 20, 1980.

Notice is hereby given that the County of Los Angeles, Kenneth F. Fare, Harry Hufford and Jackie Hasenstab, defendants above named, hereby appeal to the Supreme Court of the United States from the entire final judgment entered on August 19, 1980.

This appeal is taken pursuant to 28 U.S.C. §1253.

DATED: October 20, 1980.

Respectfully submitted,

JOHN H. LARSON
County Counsel

By /s/ WILLIAM F. STEWART
William F. Stewart, Chief
Labor Relations Division

Attorneys for Defendants.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiff(s), vs Clarence E. Cabell, etc., Defendant(s). Case Number CV-76-0541-IH.

PROOF OF SERVICE /
ACKNOWLEDGEMENT OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years employed in the County of Los Angeles, State of California, and not a party to the above-entitled

cause. On October 20, 1980, I served a true copy of NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES ( ) by personally delivering it to the person(s) indicated below in the manner as provided in FRCivP 5(b); (XX) by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:

Richard A. Paez
Western Center on Law and Poverty
1709 West 8th St., Ste 600
Los Angeles, CA 90017

All parties required to be served have been served.

Place of Mailing: Los Angeles, California.

Executed on October 20, 1980 at Los Angeles, California.

( ) I hereby certify that I am a member of the Bar of the United States District Court, Central District of California.*

(XX) I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.*

*/s/ BARBARA B. MacNAIR
Signature of person making service.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiff(s), vs. Clarence E. Cabell, etc., Defendant(s). Case Number CV-76-0541-IH.

PROOF OF SERVICE /
ACKNOWLEDGEMENT OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years employed in the County of Los Angeles, State of California, and not a party to the above-entitled

cause. On October 20, 1980, I served a true copy of NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES ( ) by personally delivering it to the person(s) indicated below in the manner as provided in FRCivP 5(b); (X) by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:

RICHARD A. PAEZ
LEGAL AID FOUNDATION OF LOS ANGELES
1550 West Eighth Street
Los Angeles, CA 90017

MARY S. BURDICK
WESTERN CENTER ON LAW AND POVERTY INC.
3535 West Sixth Street
Los Angeles, CA 90020

All parties required to be served have been served.

Place of Mailing: Los Angeles, California.

Executed on October 20, 1980 at Los Angeles, California.

( ) I hereby certify that I am a member of the Bar of the United States District Court, Central District of California.*

(XX) I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.*

* /s/ BARBARA A. MacNAIR
Signature of person making service.

APPENDIX D.

Opinion.

Jose Chavez-Salido et al., Plaintiffs, v. Clarence E. Cabell, in his official capacity as Acting Chief Probation Officer of Los Angeles County, et al., Defendants. No. CV 76-0541-1H.

United States District Court, C. D. California. Feb. 3, 1977.

Addendum to Opinion March 14, 1977.

Resident aliens, who sought employment as deputy probation officers, brought suit challenging a California statute providing that one must be a citizen of the United States to hold any governmental position, state, county or local, which is declared by law to be a peace officer or which has the powers of a peace officer. A Three-Judge District Court, Irving Hill, J., held that the statute denied equal protection on its face and as applied to the resident aliens.

Partial judgment for plaintiffs.

Richard A. Paez, Michele Washington, Western Center on Law and Poverty, Inc., Los Angeles, Cal., for plaintiffs.

Philip H. Hickok, Deputy County Counsel, Los Angeles, Cal., for defendants.

Before BARNES, Senior Circuit Judge, CURTIS, Senior District Judge, and IRVING HILL, District Judge.

HILL, District Judge:

In this opinion, in a case of first impression, we declare unconstitutional California Government Code § 1031(a). That section provides that one must be a citizen of the United States to hold any governmental position, state, county or local, which is declared by law to be a peace officer or which has the powers of a peace officer. The case is brought by three plaintiffs who applied for, and were denied, ap-

pointment to the position of Los Angeles County deputy probation officer solely because of the statutory requirement of American citizenship. Under California Penal Code § 830.5 a deputy probation officer is declared to be a peace officer and is therefore subject to the citizenship requirement of Government Code § 1031(a). We hold § 1031(a) to be both unconstitutional on its face and unconstitutional as applied. We also hold that a county may be held liable for damages in an action brought directly under the 14th Amendment and in an action brought under 42 U.S.C. § 1981.

I.

FACTS.

Plaintiffs, Chavez-Salido, Ybarra and Bohorquez, as of the date the complaint was filed, were lawfully admitted permanent resident aliens living in Los Angeles County. In a single-count first amended complaint seeking both injunctive relief and damages, they sue Los Angeles County, its Chief Personnel Officer, its Acting Chief Probation Officer and the Personnel Officer of the County's Probation Department.[1] The case was tried without live witnesses. Most of the facts were stipulated to and some additional facts were received by uncontradicted affidavits.

Each of the plaintiffs has applied for appointment to the County Probation Department as a Deputy Probation Officer II. This position carries a salary of $1,185 per month. There are some factual differences in the status of the three plaintiffs and in the treatment accorded their applications.

---

[1]Defendant Nesvig has been succeeded as Chief Personnel Officer of the County by Harry L. Hufford. Defendant Cabell has been succeeded as Chief Probation Officer of the County by Kenneth Fare. In both situations the present incumbent has been substituted for his predecessor under Fed.R.Civ.P. 25(d)(1).

Chavez-Salido has resided here as a lawfully admitted permanent resident alien since 1955. His application to become a Deputy Probation Officer II was filed on March 27, 1975. An oral examination is given for this position, with 70 being the minimum passing grade. Chavez-Salido took the examination May 1, 1975, scored 95, and was notified that he was being placed on the eligibility list. In September, 1975, he was notified that a job opening existed. But shortly thereafter he was told he would have to show proof of citizenship to receive an appointment. Being unable to do so, he was denied employment. The denial is stipulated to have been solely the result of the citizenship requirement of Government Code § 1031(a).

The County also has a position called Deputy Probation Officer Trainee, paying substantially less than Deputy Probation Officer II. The Trainee position does not require citizenship since it is not given by law the status or powers of peace officer. Chavez-Salido was offered the Trainee position on December 1, 1975 and accepted it. He had applied for American citizenship well before applying to become a probation officer. His citizenship petition was granted and he was made a citizen on March 15, 1976. However, by that time, his name had been taken off the eligibility list for Deputy Probation Officer II. In August, 1976, he was promoted to the position of Deputy Probation Officer I. The Officer I position pays more than the Trainee position but less than the Officer II position and citizenship is required for it.

Plaintiff Ybarra has been a lawfully admitted permanent resident alien since 1972. On August 22, 1975 he applied for the position of Deputy Probation Officer II. He scored 70 on the examination. On the same date Ybarra also applied for the Trainee position. On October 8, 1975 he applied for the position of Deputy Probation Officer I. He passed the

Officer I examination with a score of 80. He was told that he was qualified for both probation officer positions, that there was a job open in the I category, but no job was open in the II category although he would be placed on an eligibility list for the latter. He was also told that for both probation officer positions he was required to present proof of citizenship. Being unable to do so, he was denied the Officer I appointment and a position on the eligibility list for Officer II. It is again stipulated that these denials were solely the result of the statutory citizenship requirement. Ybarra was employed by the Los Angeles City Housing Authority during the entire application and examination period and apparently is still so employed. Ybarra has not to this date applied for American citizenship.

Plaintiff Bohorquez has been a lawfully admitted permanent resident alien since 1961. At the time the case was argued, he had never applied for American citizenship and, so far as we know, has still not done so. His application for the position of Deputy Probation Officer II was filed January, 1975. He was given the oral examination on May 5, 1975 but during the examination was told that he could not receive an appointment to the position sought because of his lack of citizenship. He was subsequently notified that he had failed to achieve a passing score of 70 on the examination. There is a procedure whereby an applicant can appeal his examination results. Bohorquez was notified that because he failed to meet the citizenship qualifications it would be useless to appeal. He therefore did not appeal and has refrained from filing further applications, though he is still desirous of appointment. Bohorquez was unemployed at the time of his application and examination and has remained unemployed since. It appears that he never sought appointment as a Probation Officer Trainee. Whereas Chavez-Salido and Ybarra seek damages by way of back

pay as part of their relief, Bohorquez seeks only the opportunity to take a new examination.

Each plaintiff was at all times willing to take the loyalty oath prescribed in the California Constitution for all public employees. Cal.Const. art. XX, § 3. That oath includes an agreement to support and defend the Federal and State Constitutions.

The first amended complaint, upon which the case was tried,[2] challenges § 1031(a) and the citizenship requirement therein contained, under the equal protection clause of the 14th Amendment and under two provisions of the Civil Rights Acts, 42 U.S.C. §§ 1981 and 1893. These challenges articulate a claim of unlawful discrimination on the basis of alienage. In addition, the complaint asserts that § 1031(a) unconstitutionally infringes upon plaintiffs' right to travel and upon Congress' power to regulate aliens. The latter claim invokes the supremacy clause of the Federal Constitution. Each plaintiff seeks a declaratory judgment invalidating the statute and injunctive relief prohibiting its application to him. All three plaintiffs seek attorneys fees. As stated, two plaintiffs seek money damages.

Plaintiffs requested the convening of a three-judge court under 28 U.S.C. §§ 2281 and 2284[3] Defendants agreed that a three-judge court should be convened and the Chief Judge of the Circuit appointed the members of the three-judge

---

[2]The first amended complaint was originally drawn as a class action. Before the trial, by stipulation of all parties, an order was entered striking all class action claims and aspects.

[3]During the pendency of the action, Congress enacted new legislation substantially limiting the availability of three-judge courts. The Three-Judge Court Amendments of 1976, Pub.L. No. 94-381, 90 Stat. 1119. The new law by its terms does not apply to actions commenced before its enactment, i.e. August 2, 1976, and thus the instant case was unaffected by the new statute.

court on April 26, 1976.[4] The case was tried and argued August 20, 1976.

II.

JURISDICTION.

The individual defendants do not contest the jurisdiction of this court to entertain the instant action against them. They apparently concur in plaintiffs' assertion that a claim is stated against them which is cognizable under 42 U.S.C. § 1983, with jurisdiction accruing to this Court under 28 U.S.C. § 1343(3). Section 1983 imposes liability on any *person* who, under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution . . .." Section 1343(3) grants to the district courts original jurisdiction to redress any deprivation of constitutional rights of the type described in § 1983.

---

[4]We are aware, of course, of the teaching of the Supreme Court in *Hagans v. Lavine*, 415 U.S. 528, 95 S.Ct. 1372, 39 L.Ed.2d 577 (1974). *Hagans* holds that before resorting to a three-judge court, the single district judge should exhaust all potentially dispositive claims within his jurisdiction. The claim in the instant case of invalid state intrusion into the federal power to regulate immigration is not based on any alleged conflict between § 1031(a) and any specific federal law or regulation. Plaintiffs refer only generally to the Immigration and Naturalization Act, 8 U.S.C. § 1101 *et seq*. *Hagans* describes a claim that direct conflict between a specific state statute and a specific Congressional enactment renders the state statute "unconstitutional". The opinion in *Hagans* denominates such a conflict claim as "statutory" and differentiates it from a claim of a clearly constitutional nature. *Hagans* holds that the single district judge must decide such a statutory claim before requesting that a three-judge court be convened to consider other claims. The supremacy clause claim of the plaintiffs here, like their other claims of unconstitutionality, derives "exclusively and directly from the Federal Constitution rather than from federal legislation [and] entail[s] an immediate resort to the Constitution . . .." *Norwick v. Nyquist*, 417 F.Supp. 913, 916 (S.D.N.Y.1976). All of the claims of the instant plaintiffs are of a clearly constitutional nature. None of the claims is "statutory" in the *Hagans* context. Therefore, in our view, a three-judge court was properly convened.

But Defendant Los Angeles County does contest our jurisdiction. Plaintiffs argue that their complaint states a claim against the County both for violation of their equal protection rights under the 14th Amendment and for violation of 42 U.S.C. § 1981. Section 1981 in relevant part reads:

> "All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts, to sue, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .."

Plaintiffs argue that if a claim is stated under either or both of these bases, our jurisdiction over the County derives from 28 U.S.C. § 1331(a), the general grant to the district courts of federal question jurisdiction. Section 1331(a) confers jurisdiction in all civil actions which arise "under the Constitution, laws, or treaties of the United States" and "wherein the matter in controversy exceeds the sum of value of $10,000 . . .."

Defendant County strongly urges that it, as a political subdivision, is not suable under § 1981. The County unfortunately took no position, either in its brief or in argument, as to plaintiffs' asserted alternative basis of liability, i.e. direct violation of the 14th Amendment. We have examined both bases as well as the question of the existence in the case of the $10,000 amount in controversy requirement under § 1331(a).

We hold that the complaint states a cognizable claim against the County on both 14th Amendment and § 1981 grounds and that the amount in controversy exceeds $10,000. Therefore, we hold that this court has jurisdiction of the claim against the County under § 1331(a).

(A) *The Section 1981 Claim*

It is settled that the right to be free from illegal discrimination in employment is encompassed within the right "to make and enforce contracts" protected by § 1981. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). *Johnson* involved racial discrimination in employment. In *Graham v. Richardson*, 403 U.S. 365, 277, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) the Supreme Court held that aliens are within the class protected by § 1981 and may utilize that section as plaintiffs. *Graham* involved welfare benefits. Although neither the Supreme Court nor our Circuit have spoken on the question of alienage discrimination in employment, the Fifth and Seventh Circuits in carefully considered opinions, and a number of district courts, have held that § 1981 applies to discrimination in employment based on alienage as well as to employment discrimination which is racially based.[5] We choose to follow those holdings.

So we turn to the question of whether an action under § 1981 may be maintained against a political subdivision of a state.

Since *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) it has been established law that a political subdivision of a state is immune from a damage claim under § 1983 because it is not a "person". And that im-

---

[5]*Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); *Roberto v. Hartford Ins. Co.*, 177 F.2d 811 (7th Cir. 1949), *cert. denied*, 339 U.S. 920, 70 S.Ct. 622, 94 L.Ed. 1343 (1950); *Spiers v. C. Itoh & Co. (America), Inc.*, 408 F.Supp. 916 (S.D.Tex.1976); *Hollander v. Sears, Roebuck & Co.*, 392 F.Supp. 90 (D.Conn.1975); *Mohamed v. Parks*, 352 F.Supp. 581 (D.Mass.1973); *Lopez v. White Plains Housing Authority*, 355 F.Supp. 1016 (S.D.N.Y.1972); *League of Academic Women v. Regents of Univ. of Calif.*, 343 F.Supp. 636 (N.D.Cal.1972). *Cf. Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976).

munity has been extended to claims for injunctive relief. *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973).

Since §§ 1981 and 1983 are parts of what is generally called the Civil Rights Acts, it is tempting to argue that a political subdivision's immunity from suit under one section extends to the others. And our Circuit in *Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972) appears to have accepted that argument, holding that a political subdivision is also not amenable to suit under § 1981. The County's claim that it cannot be sued under § 1981 is founded almost exclusively on *Arunga*.

We have pondered the *Arunga* opinion and in so doing, we have examined the record and the briefs. We believe, with the utmost respect, that *Arunga* may have been insufficiently considered and that it reaches an incorrect result. One district court in this district has previously declined to follow *Arunga*, *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal.1976), and we do likewise. We alsc believe that whatever authority *Arunga* has, has been undermined by language in a more recent decision of the Supreme Court.

Arunga was an action brought in *pro. per.* by a black legally admitted resident alien of Kenyan nationality. He sued the City of Alameda and one of its police officers (who was never served) for a claimed physical assault arising out

of an allegedly unlawful arrest.[6] The trial court twice granted the City's motion to dismiss for lack of jurisdiction. The first grant was with permission to amend, and following submission of an amended complaint, the second dismissal was granted without leave to amend. The appeal followed. In the Court of Appeals the matter was submitted without

---

[6]Arunga's papers throughout the record demonstrate that he was both unlearned and confused. The amended complaint is in one count; its jurisdictional paragraph cites only § 1983. A later paragraph merely mentions §§ 1981 and 1985 along with § 1983. The complaint does not mention § 1986 at all. The gravamen of the complaint is a prayer for money damages of $1.5 million dollars as general and exemplary damages for the assault upon plaintiff and his physical and mental suffering. Some of the damages sought for mental suffering are claimed to be for the emotional effect upon plaintiff of his grandfather's premature death resulting from the "humiliation" to plaintiff. Plaintiff denominated his case as a class action and for some obscure reason prayed that a three-judge court be convened for the purpose of declaring unconstitutional Article 11, Section 11 of the California Constitution which confers local police power upon counties and cities.

In the City's original motion to dismiss, the points and authorities supporting it consisted of one sentence which asserted that "a city is not a 'person' under 42 U.S.C. §§ 1981-88". The motion to dismiss the amended complaint was likewise supported by a single sentence argument as follows:

> "Plaintiff's 'AMENDED PLEADING' adds nothing except jibberish and still fails to state a cause of action against the City." *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968).

Diamond and Brown are both § 1983 cases declaring municipal immunity. The trial court in neither of its dismissal orders cited any authority or stated any reason.

Arunga's brief on appeal does not mention § 1981 and does not even mention the suability of a political subdivision under any of the Civil Rights Acts. His brief is almost entirely devoted to the three-judge court issue and a discussion of state police power. The city's brief on appeal devotes only seven lines to the suability question, as follows:

> "It is clear that a City may not be sued under 42 U.S.C. §§ 1981-85. *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961); *Moor v. Madigan* [458], F.2d [1217] (9th Cir. No. 71-3019; 71-3020, March 1972); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968). Under the authorities cited, the District Court was unquestionably correct in dismissing plaintiff's action as to the City."

argument. The opinion is per curiam and in two short paragraphs:

> "The plaintiff filed an action against the City of Alameda alleging that he had been deprived of rights in violation of 42 U.S.C. §§ 1981 and 1986. The complaint was dismissed on motion upon the ground that the city is not a 'person' and cannot be sued under the Civil Rights Act. [sic] An amended pleading based upon the same statute against the same defendant was again dismissed and this appeal taken.
>
> It is abundantly clear that a municipal corporation is not a 'person' subject to suit under 42 U.S.C. 1983. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969). The district court was unquestionably correct and we affirm." (Footnote omitted).

We believe the first sentence of the opinion to be factually incorrect because we cannot find in the amended complaint any claim of a violation of § 1986. The second paragraph of the opinion, which contains the holding, makes what we believe a fundamental error with respect to § 1981, i. e. the assumption that liability is imposed by § 1981 only upon "persons". Whereas § 1983 does use that term defining who is liable, § 1981 does not use the term nor does it limit in any way who may be liable as a defendant for a violation.

It is unfortunate but understandable that the *Arunga* opinion assumes that various of the Civil Rights Acts (42 U.S.C. § 1981 through § 1988) and particularly §§ 1981, 1982 and 1983, should be construed and applied according to common rules and principles. This approach may well result from the fact that all of the substantive Civil Rights Acts were

codified together in 1874 in the Revised Statutes.[7] But it ignores certain other important historical facts: (1) that §§ 1981 and 1982, which are companion sections, were originally enacted in 1866, whereas § 1983 did not become law until 1871[8] and (2) that §§ 1981 and 1982 are derived from, and based upon, the 13th Amendment, whereas § 1983 was enacted to implement the 14th Amendment.[9]

As the Supreme Court points out in *Monroe*, the legislative history of § 1983 and the use of the term "person" therein, preclude its application to political subdivisions. But a careful examination of the legislative history of §§ 1981 and 1982 establishes, we think, with equal clarity, that political subdivisions were intended to be included within their ambit. The legislative history of § 1981 to which we refer has been extensively collated by at least three other district courts. *Robinson v. Conlisk*, 385 F.Supp. 529 (N.D.Ill.1974); *Maybanks v. Ingraham*, 378 F.Supp. 913 (E.D.Pa.1974); *League of United Latin American Citizens v. City of Santa Ana, supra*. It serves no useful purpose for us to duplicate or reproduce those discussions; we incorporate them by reference.

The Supreme Court, post-*Arunga*, has said in analyzing § 1982:

---

[7]For further discussion of the history of the codification, see *Runyon v. McCrary*, 427 U.S. 160, 168 n. 8, 96 S.Ct. 2586, 2593 n. 8, 49 L.Ed.2d 415 (1976).

[8]With respect to the other parts of what has been called "The Civil Rights Acts", §§ 1987 and 1988 enacted along with §§ 1981 and 1982, in 1866, and § 1986 was adopted with § 1983, as part of the Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13. A part of § 1985 was originally enacted in 1861, but the present full § 1985 was also adopted in 1871. Section 1984, which grants no substantive rights, was not enacted until 1875. Act of March 1, 1875, ch. 114, § 5, 18 Stat. 337.

[9]In addition to §§ 1981 and 1982, §§ 1987 and 1988 are also based upon the 13th Amendment while §§ 1985 and 1986, along with § 1983 were enacted pursuant to the 14th Amendment.

> "[L]ike the Amendment upon which it is based, § 1982 is not a 'mere prohibition of State laws establishing and upholding racial discrimination in the sale and rental of property, but rather [is], an 'absolute' bar to all discrimination, private as well as public, federal as well as state." *District of Columbia v. Carter*, 409 U.S. 418, 422, 93 S.Ct. 602, 605, 34 L.Ed.2d 613 (1974).

We read this language as an affirmation that all sources of discrimination, including governmental entities, are reachable under § 1982.

Because they are companion sections, having a common derivation and legislative history, it would appear that what applies to § 1982 applies with equal force to § 1981.[10]

Unfortunately, the Supreme Court has not yet decided the question of whether political subdivisions are suable under § 1981. One circuit and a number of district courts have held, as we hold, that they are.[11] Two district courts outside our Circuit, relying on *Arunga*, have held that they are not.[12] The lack of a definitive Supreme Court decision and the paucity of other authority since *Arunga* probably results from the passage of the 1972 amendments to Title VII of the Civil Rights Act of 1964, making political sub-

---

[10] *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 422 n. 78, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Bowers v. Campbell*, 505 F.2d 1155, 1157-58 (9th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.*, 156 U.S.App.D.C. 69, 478 F.2d 979, 993-94 (1973).

[11] *Campbell v. Gadsden County District School Board, supra* note 5; *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal.1976); *Robinson v. Conlisk*, 385 F.Supp. 529 (N.D.Ill.1974); *Hines v. D'Artois*, 383 F.Supp. 184 (W.D.La.1974); *Maybanks v. Ingraham*, 378 F.Supp. 913 (E.D.Pa.1974).

[12] *Redding v. Medica*, 402 F.Supp. 1260 (W.D.Pa.1975); *Black Brothers v. City of Richmond*, 386 F.Supp. 147 (E.D.Va.1974).

divisions amenable to suit under Title VII for discrimination in employment.[13] The confusion caused by *Arunga* leads us to the fervent hope that our Circuit will shortly have occasion to take a second look at the legal question decided in it.

(B) *The 14th Amendment Claim*

A claim cognizable in this court is stated against the County under the 14th Amendment. Relatively recent authority makes clear that political subdivisions of states are answerable in the district courts for direct constitutional violations in a complaint seeking injunctive relief, damages or both, despite the absence of any statute specifically creating the cause of action.

In 1971 the Supreme Court held in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) that, without an enabling statute, liability in damages existed for direct constitutional violations with district court jurisdiction being found in § 1331(a). The defendants in *Bivens* were federal FBI agents and the direct constitutional violation alleged was a 4th Amendment violation. No extension of *Bivens* to agents of state or local government was needed since 42 U.S.C. § 1983 provided a specific remedy in the federal courts against them, and 28 U.S.C. § 1343(3) provided clear federal jurisdiction.

Utilizing the Bivens rationale, the Supreme Court later *clearly* implied that an action may be brought in the federal courts against political subdivisions of states for direct constitutional violations including 14th Amendment violations.

---

[13]Plaintiffs in our case cannot resort to Title VII because discrimination based on alienage is not included within the types of discrimination prohibited by it. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1974).

City of Kenosha v. Bruno, supra[14] After twice declining to decide that question[15] our own Circuit has now specifically decided it. Relying on *Kenosha*, the Circuit held that political subdivisions of states may be sued for both damages and equitable relief for constitutional violations, with jurisdiction being provided by § 1331(a). *Gray v. Union County Intermediate Education Department*, 520 F.2d 803, 805 (9th Cir. 1975).[16] *Gray* involved a school district but the court characterized a school district as a "political subdivision" of a state. *Id.*

(C) *Amount In Controversy*

Having determined that a claim "arising under the Constitution" and one also arising "under the laws" of the United States are presented, we have jurisdiction of that

---

[14]Plaintiffs were holders of retail store and tavern liquor licenses whose renewal applications had been denied by the two defendant cities under procedures set up by state statute. Alleging that their renewal applications were unconstitutionally denied, they sought injunctive relief including a declaration that the statutes involved were unconstitutional. A three-judge district court held that a claim under § 1983 was properly pled against the cities because only equitable relief was sought, and found jurisdiction under § 1343(3). The Supreme Court reversed the § 1983 holding but remanded the case rather than ordering judgment for the defendant cities. The remand order assumed that jurisdiction might well exist under § 1331(a) if the requisite amount in controversy was shown to exist. Two Justices, in a concurring opinion, viewed the remand as a holding by the Court, for the first time, that jurisdiction existed under § 1331(a) for actions against a city charging direct constitutional violations. See concurring Opinion of Brennan, J., 412 U.S. at 516, 93 S.Ct. 2222.

[15]*Aldinger v. Howard*, 513 F.2d 1257 (9th Cir. 1975), *aff'd*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974).

[16]The Third and Fifth Circuits and other district courts are in accord that direct constitutional causes of action may be maintained against political subdivisions of states. *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976); *Skehan v. Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974); *Redding v. Medica*, 402 F.Supp. 1260 (W.D.Pa. 1975); *Williams v. Brown*, 398 F.Supp. 155 (N.D.Ill.1975); *Maybanks v. Ingraham, supra*, note 11; *Dahl v. Palo Alto*, 372 F.Supp. 647 (N.D.Cal.1974). But *Cf. Brault v. Town of Milton*, 527 F.2d 730 (2d Cir. 1975) (*en banc*).

claim under § 1331(a) if the "amount in controversy exceeds $10,000."

The amount in controversy must be found to exist under § 1331(a) as to each plaintiff. *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). If attention is focused solely on the amount of awardable money damages, one might entertain a substantial doubt about the existence of the requisite $10,000 jurisdictional requirement in this case. No plaintiff pleads money damages in any specific amount. One plaintiff seeks no money damages at all. The other two, who were employed in other positions during the period in question, seek damages consisting of "back pay and seniority benefits". If each of those plaintiffs must offset,by way of mitigation, the wages and benefits earned at other work, it is quite clear that neither could be awarded damages which exceed $10,000.[17]

But it is not proper, in deciding the amount in controversy, to focus solely on the money damage aspect of this case. Equitable relief, by way of injunction, is also sought here. In *Glenwood Light & Water Company v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 36 S.Ct. 30, 60 L.Ed. 174 (1915), the Court said of injunctive actions:

> " . . . The jurisdictional amount is to be tested by the value of the object to be gained by the complainant." 239 U.S. at 125, 36 S.Ct. at 32.

And of civil rights actions under 28 U.S.C. § 1331, it has been said that the amount in controversy is the value

---

[17]The difference in pay between the trainee position accepted by Chavez-Salido and the position he now seeks is $333 per month and the period of denial is less than 18 months. As to Ybarra, the evidence indicates that he earned an average of about $900 per month during the denial period in the job at the Housing Authority. For Ybarra, the denial period does not exceed 14 months.

of the right to be protected. 1 Moore's Federal Practice § 0.96[3.-1] at 939.[18]

Where a case involves denial of employment or dismissal from employment, courts have held that the amount in controversy may be met by considering the value of the job in question, i.e. the amount of money which plaintiff would earn in the job for the indefinite future or for the rest of his work expectancy. *Friedman v. International Association of Machinists*, 95 U.S. App.D.C. 128, 220 F.2d 808, 810 (1955); *Hiss v. Hampton*, 338 F.Supp. 1141, 1146 (D.D.C. 1972); *White v. Bloomberg*, 345 F.Supp. 133, 141 (D.Md.1972). We adopt that rule and under it, the case of each plaintiff amply meets the $10,000 amount in controversy requirement. The value of the position of Deputy Probation Officer II, which is the "object to be gained" by the complaint, exceeds $10,000.

Since we have found that a claim is stated against the County under both the 14th Amendment and § 1981 which

---

[18]We are mindful that some courts have in effect ignored the $10,000 jurisdictional requisite in cases involving claims of violation of constitutional rights. These courts seem to hold that constitutional rights are so precious that, by definition, they are in every case worth more than $10,000. *See e.g. Spock v. David* 69 F.2d 1047 (3d Cir. 1972)., *reargued*, 502 F.2d 953 (3d Cir. 1974), *reversed on other grounds sub nom. Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *CCCO-Western Region v. Fellows*, 359 F.Supp. 644 (N.D.Cal. 1972); *West End Neighborhood Corp. v. Stans*, 312 F.Supp. 1066 (D.D.C.1970). This view apparently stems from the separate opinion of Mr. Justice Stone in *Hague v. C.I.O.*, 307 U.S. 496, 529, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). There is substantial contra authority. *See e.g. Goldsmith v. Sutherland*, 426 F.2d 1395 (6th Cir.) *cert. denied*, 400 U.S. 960, 91 S.Ct. 353, 27 L.Ed.2d 270 (1970); *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001, 85 S.Ct. 718, 13 L.Ed.2d 702 (1965). In the absence of any decision on the point from our Circuit we decline to follow the cases first-above cited which find the amount in controversy invariably present because constitutional rights are not capable of valuation in monetary terms. For a full discussion of the entire problem, see the footnote in *Gomez v. Wilson*, 155 U.S.App.D.C. 242, 477 F.2d 411, 420 n.56 (1973).

is cognizable in a district court, and that the jurisdictional amount in controversy exists, we find jurisdiction against the County is granted to us under § 1331(a).[19]

* * *

III.

THE MERITS

In three recent cases the Supreme Court has invalidated state statutes or regulations requiring citizenship as a condition of obtaining public employment or licenses.[20] In *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973) the Court struck down a provision of the New York Civil Service Law which required citizenship for appointment to any position in the state's classified civil service. There were four named plaintiffs, all permanent legal resident aliens, who sued for themselves and for a class. Two of the plaintiffs were clerk-typists, one was a human resources technician, and the fourth an administrative assistant.

---

[19]We also note, *sua sponte*, that jurisdiction of the claim against the County may also exist under another jurisdictional statute, 28 U.S.C. § 1343(4).

Section 1343(4) is a grant to the district courts of original jurisdiction in any civil action "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." Section 1343(4) is not broad enough to cover a charge of direct violation of the 14th Amendment since the section is limited to civil actions arising "under any Act of Congress". But since we hold that the County is amenable to suit in a § 1981 action, § 1343(4) would give us jurisdiction and without respect to the amount in controversy. *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974); *Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976).

[20]See also the summary affirmance by the Supreme Court in *Lefkowitz v. C.D.R. Enterprises, Ltd.*, ... U.S. .... , 97 S.Ct. 721, 50 L.Ed.2d 742 (1977), *aff'g C.D.R. Enterprises, Ltd. v. Board of Education of City of New York*, 412 F.Supp. 1164 (E.D.N.Y.1976) (three-judge).

The Court's opinion emphasized the overbroad and indiscriminate nature of the statute, i.e. that the class of positions for which citizenship was required "reached . . . positions in nearly the full range of work tasks, . . . all the way from the menial to the policy making." *Id.* at 640, 93 S.Ct. at 2846. The opinion noted that citizenship was not required for the unclassified civil service within which many of the higher policy making decisions were included. The Court categorically rejected the claim that a state can confine public jobs, paid for by public resources, to citizens of the country. While observing that each state had the power to prescribe the qualifications of voters, elective office holders and holders of "important nonelective executive, legislative and judicial positions . . . [and] officers who participated directly in the formulation, execution, or review of broad public policy . . .," the Court emphasized that such a statute must be "narrowly confined". *Id.* at 647, 93 S.Ct. at 2850. In a provocative and much discussed passage the Court said:

> "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.' *Dunn v. Blumstein*, 405 U.S. 330, 344 [92 S.Ct. 995, 1004, 31 L.Ed.2d 274] (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.* at 642-43, 93 S.Ct. at 2848.

In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), decided the same day as *Sugarman*, struck down a rule of the Connecticut court system requiring citizenship as a prerequisite for admission to the bar. Plaintiff was a

long-time resident of the United States who was married to an American citizen and thus apparently entitled to remain here indefinitely. The Court rejected the argument that the special role of the lawyer within the governmental system justified excluding aliens from the practice of law. Although a Connecticut lawyer is denominated as a "commissioner" of the Superior Court with the right to sign writs and subpoenas, acknowledge deeds, administer oaths, take depositions and command the assistance of sheriffs and constables in the exercise of his authority, the Court stressed that these duties did not involve matters of such high policy or responsibility as would authorize a state to entrust them only to citizens. As in *Sugarman*, the Court stressed the duties imposed on resident aliens, which include the same obligation to pay taxes, and serve in the Armed Forces as are imposed on citizens. It observed that while lawyers (and other state employees) are required to take an oath to support the Federal and State Constitutions, such oath is customarily administered to resident aliens inducted into the Armed Forces and is thus deemed to be consistent with citizenship in a foreign country. The Court concluded that Connecticut had failed to establish any compelling state interest in confining law practice to citizens.

In *Examining Board of Engineers v. De Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976), the Court struck down a statute of Puerto Rico restricting the issuance of licenses for the practice of civil engineering in the private sector, to U.S. Citizens. Puerto Rico was held to be "territory" within the ambit of federal civil rights and jurisdictional statutes. Among the justifications advanced by Puerto Rico for requiring citizenship was the claim that citizen engineers are more likely to be present in the community and to be financially more accountable than noncitizens, a matter of significance since engineers may be liable for

malpractice for ten years under local law. Another justification offered was that by confining the privilege of practicing engineering to citizens, Puerto Rico could prevent the uncontrolled influx of Spanish-speaking aliens into this professional field. A third justification offered was to raise the prevailing low standard of living. The Court held that these justifications, like those of New York in *Sugarman* and Connecticut in *Griffiths*, were inadequate.[21]

From these opinions of the Supreme Court we can abstract the rules of law which we must apply in judging the California statute in question here. First, the equal protection guarantee as embodied in the 14th Amendment extends to permanent resident aliens. Second, a state statute or regulation classifying citizens and noncitizens and attaching disabilities to noncitizenship, involves a "suspect classification". Third, any "suspect classification" is subject to strict judicial scrutiny; for the statute to survive the state must establish (1) that the suspect classification [alienage] serves a compelling state interest, (2) that the classification is reasonably necessary to promote that compelling state interest, and (3) that the statute be narrowly and precisely drawn so as to avoid a classification that "sweeps too broadly".

---

[21]In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), the Supreme Court held unconstitutional a Civil Service Commission regulation requiring citizenship for practically all federal civil service positions. The holding that the Civil Service Commission was without power to exclude noncitizens from such a wide range of positions is a relatively narrow one. The Court said that such power, if it exists at all, belongs only to Congress and held that the exercise of such power by the Commission violated due process. The opinion contains interesting language which hints that Congressional, or even Presidential, action requiring citizenship as a pre-requisite for federal government employment and justified as an inducement for immigrants to become citizens, might be valid. This inducement to citizenship justification has not been dealt with in any prior opinion of the Supreme Court or in any prior judicial opinion cited to us. It was not advanced in the instant case.

We now proceed to measure the California statute, which is the subject of the instant case, against these criteria.

In relevant part, California Government Code § 103(a) provides:

> "In any instance in which . . . members of a class of public officers or employees are . . . *declared by law to be peace officers or to have the powers of peace officers*, each member of such class must meet at least the following minimum standards:
>
> (a) Be a *citizen* of the United States."
>
> (Emphasis added)

California Penal Code § 830 and various subsections thereunder provide a very long list of occupations and positions classified as peace officers or having the powers thereof. Deputy probation officers are included.[22] contains

---

[22] *Under § 830.1*

sheriff
undersheriff
deputy sheriff
policeman
marshal
deputy marshal
constable
deputy constable

Under § 830.2

highway patrolmen
members of the California State Police Division
members of the California National Guard when called into active service by the Governor
members of the University of California police department
members of a state college police department

Under § 830.3

officers and special agents of the Department of Justice, Bureau of Criminal Identification and Investigation
officers and agents of the Bureau of Narcotic Enforcement
investigators in the office of a district attorney
the Director and enforcement officers of the Department of Alcoholic Beverage Control
officers and investigators of the Division of Investigation of the Department of Consumer Affairs
investigators of the Board of Medical Quality Assurance
members and deputies of the Wildlife Protection Branch, Department of Fish and Game

(footnote continued on following page)

the entire list which ranges all the way from important law enforcement positions to positions having apparently insignificant and menial duties. Included in the latter group are sextons and superintendents of a cemetery authority and other cemetery employees, inspectors of the Bureau of Furniture and Bedding Inspection, sealers of the Department of Weights and Measures and messengers of the State Treasurer's Office.

---

county fish and game wardens
State Forester and employees of the Division of Forestry
voluntary fire wardens
officers and manager of compliance services of the Department of Motor Vehicles
investigators of the Department of Motor Vehicles
Secretary and Chief Investigator of the California Horse Racing Board
racetrack investigators of the California Horse Racing Board
police officers of a regional park district
state fire marshal, and deputy fire marshals members of an arson-investigating unit of a fire department.
members of a fire department of a local agency
inspectors of the Bureau of Food and Drug
park rangers
members of a community college police department
investigators of the Division of Labor Law Enforcement

Under § 830.4

security officers of the California State Police Division
Sargeant at Arms of each house of the Legislature
Baliffs of the Supreme Court and the courts of appeal
guards and messengers of the State Treasurer's Office
director and employees of the Department of Navigation and Ocean Development
the administrator of a state hospital and police officers designated by him
railroad or steamboat company policemen commissioned by the Governor
sextons and superintendents of cemeteries
other cemetery personnel designated by a cemetery authority (See Health and Safety Code § 8325)
harbor policemen
special officers of the Department of Airports of the City of Los Angeles
the chief of toll services of the Department of Transportation and his captains, lieutenants and sergeants employed on vehicular crossings
members of a security patrol of a school district
authorized federal employees engaged in enforcing applicable state or local laws on federal property
Los Angeles County security guards
airport policemen designated by the Monterey Peninsula Airport District

The only justification advanced by the defendants in this case as a compelling state interest is the one described in *Sugarman*, the State's power to define its "political community". We read the references in *Sugarman* to the "political community" for which the State may prescribe citizenship as a requisite of office, as being confined to high policy making officers. When confronted with this reading,

airport security officers at airports operated by San Francisco, Orange or San Joaquin Counties
housing authority patrol officers employed by the housing authorities of Los Angeles or Contra Costa Counties
Under § 830.5
parole officers of the Department of Corrections
placement or parole officers of the Youth Authority
probation officers
deputy probation officers
warden, superintendent, supervisor or guards employed by the Department of Corrections any employee having custody of a ward in an institution of the Youth Authority
transportation officers of the Youth Authority
Under § 830.5a
agents of the law liaison unit of the Department of Corrections
Under § 830.6
persons deputized or appointed as a reserve or auxiliary sheriff, deputy sheriff or city policeman
In addition to the above, the following have the powers of peace officers:
Any person summoned to the aid of any uniformed police officer as in a posse comitatus (Penal Code § 830.6[b])
the director, officers and employees of the Division of Aeronautics (Pub.Util.Code § 21252) any person vested with the power of enforcing any provisions of the Agriculture Code (Agric. Code §7)
county fire wardens and assistant and deputy fire wardens (Government Code § 24008)
inspectors of the Board of Dental Examiners (Business and Professions Code § 1704)
inspectors of the Bureau of Furniture and Bedding Inspection (Business and Professions Code § 19206)
inspectors of the Bureau of Livestock Identification (Agric. Code § 20432)
mental health counselors (Welfare and Institutions Code § 6778)
officers and employees of the state park system (Public Resources Code § 5008)
sealers of the Department of Weights and Measures (Business and Professions Code § 12013)

defendants argue that the California statute in issue is applicable to only a "few" positions which are either "high level" or require "demanding discretional decisions in their everyday execution." We cannot agree with the defendants. It is obvious from the long list of covered positions contained in the footnote that the statute is much broader than they claim and covers many positions with much less responsible duties than they describe. The claimed "political community" justification in this case, therefore, does not support this statute any more than it supported the requirement of citizenship for the classified civil service in New York State in *Sugarman*.

But even if we assume *arguendo* that the California statute serves a compelling state interest and employs a classification reasonably necessary to promote that compelling state interest, we would have to strike it down on the ground that it is not narrowly and precisely drawn and that it "sweeps too broadly."[23]

Although the concept was not discussed in the briefs, at the argument of the case, the court and counsel discussed whether the validity of § 1031(a) should be considered as applied, i.e. as limited to the position of deputy probation officer which is the position sought by all three plaintiffs.

The prior decisions of the Supreme Court dealing with alienage, which we have discussed above, would appear to rule out consideration of the validity of this statute as applied. Those decisions stress that the scrutiny which should

---

[23]In various constitutional and statutory provisions, California requires citizenship as a qualification for holding statewide elective office including Governor and Lieutenant Governor and for holding certain top executive positions in state government. *See e.g.* Cal.Const. art. 5, §§ 2 and 9 and Government Code §§ 241, 1001 and 1020. We express no view as to the validity of those provisions; they are not in issue here.

be afforded to such a statute must include an examination of whether it is too broad in its sweep, overinclusive. That is why we, as the Court did in *Sugarman*, have examined all of the types of positions for which citizenship is required. But we are also aware that in other contexts, the Supreme Court has resorted to the "as applied" technique for the announced purpose of avoiding advisory opinions and unnecessary constitutional adjudication, especially where the outer parameters of the state statute are cloudy and unadjudicated. *See, e.g., United States v. Raines*, 362 U.S. 17, 20-22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). So, out of an abundance of caution, we proceed to examine § 1031(a) as applied.

The evidence before us contains no description of the duties performed by a deputy probation officer in California. However, counsel stipulated at the argument that we may take judicial notice of those duties based on our experience as judges. It is fortunate that all three members of this court had extensive experience as state court judges in California before appointment to the federal bench.

Deputy probation officers in California perform a wide range of duties. They include preparation of presentence investigations and recommendations as to sentence, supervision of probationers (including efforts to ameliorate their employment, health and family problems) and investigation of probation violations. Also included are various duties in connection with juveniles and juvenile courts among which are the filing of juvenile court petitions charging both delinquency and illegal acts, presence at juvenile court hearings in an advisory capacity, placement of minors declared to be wards of the juvenile court and supervising custodial personnel in juvenile incarceration institutions. Important as those duties are, we cannot characterize a deputy probation officer as an employee who participates "directly in

the formulation, execution, or review of broad public policy . . . ." *Sugarman, supra,* 413 U.S. at 647, 93 S.Ct. at 2850. Since a compelling state interest appears only when the requirement of citizenship is confined to positions of that type, the statute must be condemned even as applied. As in *Griffiths,* we would find that the duties of a deputy probation officer "hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." 413 U.S. at 724, 93 S.Ct. at 2856. A similar approach has recently been taken in a well-reasoned opinion of a three-judge district court striking down a New York statute requiring public school teachers to be citizens. *Norwick v. Nyquist,* 417 F.Supp. 913 (S.D.N.Y.1976). If neither lawyers nor teachers can be required to be citizens, it would seem to us an *a fortiori* proposition that citizenship cannot be required for deputy probation officers.[24]

Having held that § 1031(a) violates the equal protection clause of the 14th Amendment, it follows that the denial of employment to the plaintiffs pursuant to § 1031(a) involves a violation of 42 U.S.C. § 1981 by the County and a violation of 42 U.S.C. § 1983 by the individual defendants. The County has denied to these plaintiffs the "same right . . . to make and enforce contracts . . ." as are enjoyed by citizens (§ 1981). The individual defendants have denied these plaintiffs "under color of [a State] statute . . . [the] rights, privileges, or immunities secured by the Constitution . . . ." (§ 1983).

---

[24]Our opinion, in striking down § 1031(a) on its face and as applied, should not be read as holding that California could not constitutionally enact a citizenship requirement for a narrowly confined class of the most important peace officers. We do not decide, for example, whether county sheriffs or city police chiefs are within the state's "political community" or whether a citizenship requirement for them would be reasonably necessary to promote such a compelling state interest.

Our decision herein should come as no shock or surprise either to the defendants in the instant case or to other California officials. Since no California court has passed upon the constitutionality of Government Code § 1031(a) up to this time the officials of Los Angeles County have apparently felt constrained to observe its requirements. But the California Attorney General seven years ago declared it to be unconstitutional.[25] His opinion appears correctly to have anticipated the Supreme Court's *Sugarman* decision. Additionally, the California Supreme Court in 1969 struck down a statute prohibiting the employment of aliens on public works[26] and, even before the Supreme Court spoke in *Griffiths*, invalidated a citizenship requirement for the practice of law.[27] And the California legislature, in 1970, repealed a blanket statute which required that every employee of the state and every county or city therein must be a citizen.[28] So the direction of the tide has been clear. One need not have qualified as a soothsayer to have predicted our present holding.[29]

Since we have declared § 1031(a) to be unconstitutional because it discriminates illegally on the basis of alienage

---

[25]53 Cal.Atty.Gen.Opin. 63 (1970).

[26]*Purdy & Fitzpatrick v. State*, 71 Cal.2d 566, 79 Cal.Rptr. 77, 456 P.2d 645 (1969) (invalidating Labor Code § 1850).

[27]*Raffaelli v. Committee of Bar Examiners*, 7 Cal.3d 288, 101 Cal.Rptr. 896, 496 P.2d 1264 (1972).

[28]*See* Historical Note preceding California Labor Code § 1960.

[29]It would have been preferable, in the interests of harmonious federal-state relationships, for plaintiffs to have sought relief in the state courts instead of mounting their initial challenge in the federal courts. In the lights of the above-mentioned California decisions and Attorney General's opinion, it appears that a 14th Amendment challenge in the state courts might well have succeeded. However, in our view, plaintiffs' bypass of state court remedies, for whatever reason, does not warrant abstention on our part.

the claims of plaintiffs involving the right to travel and intrusion on Congress' immigration powers are rendered moot. We decline to discuss or decide those claims.

IV.

RELIEF

If the statute is declared unconstitutional, defendants do not appear to dispute the specific relief sought by the various plaintiffs except as to damages and attorneys fees.

All three plaintiffs seek a declaratory judgment that Government Code § 1031(a) is unconstitutional and an injunction preventing its enforcement against them. Such declaratory judgment and injunction shall issue. The judgment will run against all defendants and will bind the successors in office of the individual defendants.

As to Plaintiff Chavez-Salido, the judgment will contain an order requiring his immediate appointment to the position of Deputy Probation Officer II—Spanish Speaking, with seniority rights retroactive to September, 1975. As to Plaintiff Ybarra, the judgment will contain an order requiring his immediate appointment to the position of Deputy Probation Officer I with seniority benefits retroactive to January, 1976. The judgment will further order his restoration to the eligibility list for Deputy Probation Officer II—Spanish Speaking, retroactive to November, 1975.

As to Plaintiff Bohorquez, the judgment will contain an order directing defendants to invalidate the results of the examination for Deputy Probation Officer II—Spanish Speaking, which he took in May, 1975 and requiring them immediately to give him another test. Should Bohorquez pass the new test, the judgment will order him restored to the eligibility list for that position retroactive to May, 1975.

We pass now to the issue of damages. Plaintiffs have formally renounced any intention to seek a damage award against any individual defendant.[30] Thus the court is not required to consider certain difficult questions of governmental employee immunity which would arise if money damages were sought against the individuals.

However, plaintiffs do press their claim for money damages against the County. It is settled that a county is not clothed with the immunity from money damage awards enjoyed by a state under the 11th Amendment, unless the county's damage obligation would be paid out of the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The County makes no showing that if damages are awarded against it, they must be paid from state funds. Thus, the County is not immune. But whether damages should be awarded against the County under the facts of this case is a matter that we, as a three-judge court, decline to decide at this point.

The parties have neither briefed nor argued for us a number of questions related to a possible damage award against the County. These include (1) whether damages are compelled or discretionary, (2) if discretionary, what factors should be considered in exercising that discretion, and (3) the measure of damages, including whether there should be an offset by way of mitigation for sums earned in other employment. We therefore refer the matter of damages to the single judge to whom the case was originally assigned for further consideration by him. He will have authority to enter any further judgment on the issue which he deems appropriate. One difficult question to be considered by the single judge is whether damages should be awarded at all

---

[30]See the stipulation of counsel filed Jan. 13, 1976 which renounces both damages and attorneys fees as against the individual defendants.

where the act complained of as being illegal was the County's observance of the clear and unequivocal mandate of a state statute which had not been declared unconstitutional by any court.

The plaintiffs also seek attorneys fees, but only against the County. At the time of the filing of this action and its trial, it appeared that attorneys fees were not awardable in civil rights damage actions except where specific authority to award them was contained in the applicable statute. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). And, there was no specific statutory authority for fees which applied to our case. However, after the argument, a new statute on the subject became effective which authorizes discretionary awards of attorneys fees to the prevailing party in certain civil rights matters. The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L.No. 94-559, 90 Stat. 2641. The new Act is not expressly applicable to cases pending on the date of its enactment, but a recent action of the Supreme Court indicates that it may well be,[31] and a recent district court decision so holds.[32]

It is therefore appropriate for us also to refer the attorneys fees question to the single judge to whom the case was originally assigned, with authority to decide it.

This opinion will constitute this court's findings of fact and conclusions of law as to the issues herein decided and the partial judgment herein ordered. Counsel for plaintiffs will prepare and submit a partial judgment within ten days. Defense counsel, if the proposed partial judgment is not

---

[31]See the summary disposition in *Stanton v. Bond*, ... U.S. .... , 97 S.Ct. 479, 50 L.Ed.2d 581 (1976).

[32]*Wade v. Mississippi Cooperative Extension Service*, 424 F.Supp. 1242 (N.D.1976).

approved by him as to form, will have ten days further in which to file written objections which will not change the result. The single district judge to whom the case was assigned, after deciding the unresolved questions referred to him herein, may sign and file a final judgment in the case.

ADDENDUM TO OPINION

Following the filing of our Opinion on February 3, 1977, we became aware for the first time of an *en banc* decision of our Circuit in *Sethy v. Alameda Co. Water District*, 545 F.2d 1157 (9th Cir. 1976). It was published in Federal Reporter (2d Series) after our Opinion was filed. In *Sethy*, the Circuit appears to overrule *Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972) and explicitly holds that a municipal subdivision may be sued under § 1981. Our Opinion is in accord with the *Sethy* decision and *Sethy* in no way affects either the rationale or the result we reached herein.

APPENDIX E.

§ 131.4. Probation officer and deputies; performance of duties; powers over probationers; courts served by officers

Any of the duties of the probation officer may be performed by a deputy probation officer and shall be performed by him whenever detailed to perform the same by the probation officer; and it shall be the duty of the probation officer to see that the deputy probation officer performs his duties.

Such probation officer and each deputy probation officer shall have, as to the person so committed to the care of such probation officer or deputy probation officer, the powers of a peace officer.

The probation officers and deputy probation officers appointed under section 131.2 of this code shall serve as such probation officers in all courts having original jurisdiction of criminal actions in this State. (Added by Stats.1939, c. 1093, § 5.)

Office-Supreme Court, U.S.
FILED
MAY 28 1981
ALEXANDER L. STEVAS,
CLERK

80-990

No. 80-900
IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer for the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic;

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

JOINT APPENDIX.

JOHN H. LARSON,
County Counsel,
WILLIAM F. STEWART, Chief
Labor Relations Division,
648 Hall of Administration,
500 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-1829,
Attorneys for Appellants.

MARY S. BURDICK,
WESTERN CENTER ON LAW
& POVERTY, INC.,
3535 West Sixth Street,
Los Angeles, Calif. 90020,
(213) 487-7211,
RICHARD A. PAEZ,
LEGAL AID FOUNDATION OF
LOS ANGELES,
1550 West Eighth Street,
Los Angeles, Calif. 90017,
(213) 487-3320,
Attorneys for Appellees.

APPEAL DOCKETED DECEMBER 17, 1980.
PROBABLE JURISDICTION NOTED MARCH 9, 1981.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

JOINT APPENDIX

	Page
Chronological List of Relevant docket Entries	1
First Amended Complaint	3
Defendants' Answer to First Complaint as Modified	14
Joint Stipulation of Facts; Factual and Legal Issues to Be Tried	18
Affidavit of Jose Chavez-Salido	29
Affidavit of Pedro Luis Ybarra	32
Affidavit of Ricardo Bohorquez	34
Opinion of Three-Judge District Court	37
Partial Judgment	69
Civil Minutes — General (order of Mandate from U.S. Supreme Court Filed and Spread)	73
Opinion of Three-Judge District Court	76
DISSENTING OPINION — CURTIS, Senior District Judge, dissenting	88
Final Judgment of Three-Judge District Court	100
Government Code § 1031. Public Officers or Employees Having Powers of Peace Officers; Minimum Standards	104
§ 830.5 Correctional, Parole and Probation Officers	105
§ 131.4 Probation Officer and Deputies; Performance of Duties; Powers Over Probationers; Courts Served by Officers	106

Chronological List of Relevant Docket Entries.

March 3, 1976	Plaintiff's First Amended Complaint filed.
May 14, 1976	Defendant's Answer to First Amended Complaint as Modified filed.
July 2, 1976	Affidavits of Pedro Luis Ybarra, Ricardo Bohorquez, and Jose Chavez-Salido filed.
February 3, 1977	Opinion of three-Judge Court filed.
February 14, 1977	Proposed Partial Judgment filed.
February 23, 1977	Partial Judgment and Order entered on behalf of plaintiffs and against defendants.
July 6, 1978	Order of mandate from U.S. Supreme Court filed and spread. The plaintiffs' request for further discovery on the issue of probation officer's duties denied. Plaintiffs relieved from prior agreement adjuring liability against defendant County under 42 USC § 1983.
June 4, 1980	Opinion of three-judge court filed.
August 15, 1980	Final judgment of three-judge court filed.
August 19, 1980	Final judgment of three-judge court entered and parties notified.

October 20, 1980	**Defendants file notice of appeal to U.S. Supreme Court from judgment entered on August 19, 1980.**

First Amended Complaint.

United States District Court Central District of California.

Jose Chavez-Salido, Ricardo Bohorquez, and Pedro Luis Ybarra, Plaintiffs, vs. Clarence E. Cabell, in his official capacity as Acting Chief Probation Officer of Los Angeles County; Jacqueline Hasenstab, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; Gordon T. Nesvig, in his official capacity as Chief Personnel Officer for the County of Los Angeles, and the County of Los Angeles, a body politic. Defendants. Civil Action Civ. No. 76-0541 IH.

Plaintiffs amend their complaint as of course pursuant to the provisions of Rule 15(a) of the Federal Rules of Civil Procedure as follows:

INTRODUCTORY STATEMENT

1. This is a civil action brought pursuant to 42 U.S.C. Sections 1981 and 1983 seeking declaratory and injunctive relief enjoining the enforcement of California Government Code Section 1031(a) which unconstitutionally discriminates against Plaintiffs solely on the basis of their alienage. Plaintiffs contend that Section 1031(a), which requires United States citizenship as a prerequisite for employment as a peace officer, violates the Equal Protection Clause of the United States Constitution; that it unlawfully infringes upon the constitutional right to travel; that the regulation of resident aliens has been preempted by Congress; and that the statute is overborne by the Supremacy Clause of the Constitution.

2. Plaintiffs further seek a preliminary and permanent injunction (1) enjoining Defendants from maintaining a policy and practice of withholding or interferring with the rights of Plaintiffs to employment as peace officers because of

their status as aliens; and (3) requiring Defendants to provide equitable relief to Plaintiffs and members of their class in the form of back pay and seniority benefits.

JURISDICTION

3. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1343(3) which grants district courts original jurisdiction over any action which seeks to redress the deprivation, under color of state law, of any rights, privileges or immunities secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of any persons within the jurisdiction of the United States; and by 28 U.S.C. Section 1331, which grants district courts jurisdiction over civil actions arising under the Constitution or laws of the United States when the matter in controversy exceeds $10,000. This matter in controversy exceeds $10,000, exclusive of interest and costs.

4. Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. 2201 and 2202 and by Rules 57 and 65 of the Federal Rules of Civil Procedure which relate respectively to declaratory judgments and injunctive relief.

5. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. 2281 and 2284 in that Plaintiffs seek an injunction to restrain Defendants, public officials, from the enforcement, operation and execution of a state statute on the grounds that said statute is contrary to the constitution of the United States.

PLAINTIFFS

6. Plaintiff JOSE CHAVEZ-SALIDO is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff CHAVEZ-SALIDO was born in Juarez, Mexico on May 25, 1949. Plaintiff

CHAVEZ-SALIDO has been a permanent legal resident of these United States since 1955.

7. Plaintiff RICARDO BOHORQUEZ is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff BOHORQUEZ was born in the Republic of Columbia on February 8, 1938. Plaintiff BOHORQUEZ has been a permanent legal resident of these United States since 1961.

8. Plaintiff PEDRO LUIS YBARRA is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff YBARRA was born in Lacabe, Spain on June 21, 1938. Plaintiff YBARRA has been a permanent legal resident of these United States since 1972.

CLASS ACTION

9. Plaintiffs bring this action on their own behalf and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all lawfully admitted resident aliens who have been and/or will be denied employment by Defendants in peace officer positions, including but not limited to deputy probation officers, solely on the basis of thier alien status. Members of the class on behalf of whom Plaintiffs sue are so numerous that joinder of all members is impractical. However, there are common questions of law and fact affecting the right of all lawfully admitted resident aliens to be free from discrimination in employment based upon alienage. The claims of the Plaintiffs are typical of the claims of the class, and Plaintiffs will fairly and adequately represent the interests of the class. In addition, the Defendants have acted on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

DEFENDANTS

10. Defendant CLARENCE E. CABELL is, at this time, the Acting Chief Probation Officer for the County of Los Angeles and, as such, is the Chief Administrative Officer for the Probation Department and is ultimately responsible for all administrative decisions made within that Department, including those decisions which relate to the employment of new Deputy Probation Officers.

11. Defendant JACQUELINE HASENSTAB is, and at all times relevant hereto has been, the Personnel Officer for the Los Angeles County Probation Department and, as such, is initially responsible for all personnel decisions made within the Probation Department, including those decisions which relate to the employment of new Deputy Probation Officers.

12. Defendant GORDON T. NESVIG is, and at all times relevant hereto has been, the Chief Personnel Officer for the County of Los Angeles and, as such, is ultimately responsible for all personnel policies and decisions made for the County of Los Angeles, including those decisions which relate to the employment of persons in peace officer positions.

13. Defendant COUNTY OF LOS ANGELES, is, and at all times relevant hereto has been, a governmental entity duly organized and existing under and by virtue of the laws of the State of California.

STATEMENT OF FACTS

14. California Government Code Section 1031 provides, in relevant part:

> "Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:
>
> (a) Be a citizen of the United States."

15. California Penal Code Section 830.5 declares that, by law, deputy probation officers are peace officers for the State of California. Pursuant to these statutes, Defendants have established as a continuing policy and practice the requirement of United States citizenship as a condition for employment in any peace officer position, including the position of deputy probation officer.

Facts as to Plaintiff CHAVEZ-SALIDO:

16. On March 25, 1975, Plaintiff CHAVEZ-SALIDO filed an application for employment with the County of Los Angeles for the peace officer position of "Deputy Probation Officer II, Spanish-speaking". In April of 1975, Plaintiff CHAVEZ-SALIDO took the oral examination for the above-described position. Plaintiff CHAVEZ-SALIDO subsequently received a score of 95 on the examination and was placed on the eligibility list for Deputy Probation Officer II, Spanish-speaking. Plaintiff CHAVEZ-SALIDO was thereafter notified by Defendants of a job opening. On or about September 8, 1975, Plaintiff was advised by Mr. John Terao in the Personnel Office of the Probation Department that he would have to present proof of United States citizenship prior to receiving his appointment as a Deputy Probation Officer. Since Plaintiff is a resident alien, he was unable to produce the requisite proof and was therefore unable to satisfy this eligibility requirement. As a result, Plaintiff was denied employment in the peace officer position of Deputy Probation Officer II, Spanish-speaking by the County of Los Angeles solely on the basis of his alien status.

17. In October of 1975, Plaintiff CHAVEZ-SALIDO filed an application with the Los Angeles County Probation Department for the position of Deputy Probation Officer-Trainee. Thereafter, Plaintiff CHAVEZ-SALIDO took the

oral examination for this position and scored 100. In November of 1975, Plaintiff was contacted by Defendants and informed of a job opening for Deputy Probation Officer Trainee. Plaintiff was informed that as a condition of such employment he would have to file an application for a Petition for Naturalization with the United States Immigration and Naturalization Service (INS) or certify that such an application had previously been filed with the INS. Plaintiff was further informed that upon completion of a six month training program he would either have to be a United States citizen or he would be terminated automatically. A copy of these employment conditions is attached hereto as Exhibit "A" and by this reference is made a part hereof as though set forth in full. Plaintiff CHAVEZ-SALIDO presently has a Petition for Naturalization pending with the INS and was therefore able to accept employment as Deputy Probation Officer-Trainee. Said employment commenced on or about December 1, 1975, and unless Plaintiff CHAVEZ-SALIDO is a United States citizen by May 1, 1976, he will be terminated from his employment with the Los Angeles County Probation Department.

Facts as to Plaintiff BOHORQUEZ:

18. In January of 1975, Plaintiff BOHORQUEZ filed an application for employment with the County of Los Angeles for the peace officer position of "Deputy Probation Officer II, Spanish-speaking". On May 5, 1975, Plaintiff BOHORQUEZ took the oral examination for the above-described position. At the conclusion of the examination there was an extended discussion regarding plaintiff's non-citizen status. During the course of this discussion Plaintiff BOHORQUEZ was informed that he could not be appointed to the deputy probation officer position because he was not a United States citizen. Plaintiff was further informed that

his alien status was a major obstacle to his employment but that the position could be held open pending clarification by Defendants. On or about May 10, 1975, Plaintiff BOHORQUEZ received notification by mail from the Los Angeles County Department of Personnel that he had failed to achieve the passing score of 70 for his oral examination. Plaintiff BOHORQUEZ was therefore not placed on the eligibility list for said position and was thereby eliminated from further consideration. Plaintiff BOHORQUEZ is informed and believes, and on that basis alleges, that Defendants underscored his examination on the basis of his alien status.

Facts as to Plaintiff YBARRA:

19. In September of 1974, Plaintiff YBARRA filed applications and took oral examinations for the following peace officer positions with Los Angeles County: Deputy Probation Officer II, Deputy Probation Officer I, and Deputy Probation Officer-Trainee. On or about October 29, 1974, Plaintiff YBARRA received notification by mail from Defendants that he had passed the examination for Deputy Probation Officer II with a score of 70; the examination for Deputy Probation Officer I with a revised score of 80; and the examination for Deputy Probation Officer-Trainee with a score of 88. Plaintiff YBARRA was subsequently placed on the eligibility lists for all three positions.

20. On or about January 19, 1975, Plaintiff YBARRA received notification from the Defendants of a job opening for the position of Deputy Probation Officer II. Plaintiff YBARRA immediately met with Mr. John Terao in the Personnel Office of the Probation Department and was advised that although the Deputy Probation Officer II positions were no longer available, Plaintiff YBARRA was qualified for one of the Deputy Probation Officer I positions. Plaintiff

YBARRA was further informed by Mr. Terao that he would have to present proof of United States citizenship prior to receiving his appointment as a Deputy Probation Officer. Plaintiff YBARRA was unable to submit the required proof of citizenship and was thereafter denied employment as a peace officer by Defendants solely on the basis of his alien status.

CLAIM FOR RELIEF

21. The conduct of the Defendants in enforcing California Government Code Section 1031(a) denies to Plaintiffs and to all other persons similarly situated the full and equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. Sections 1981 and 1983 in that it arbitrarily discriminates against Plaintiffs, under the color of law, solely on the basis of their status as aliens. Plaintiffs further allege that California Government Code Section 1031(a) unconstitutionally restricts the right of Plaintiffs to engage in interstate travel as guaranteed by a pneumbra of provisions of the United States Constitution and that said section violates the Supremacy Clause in that it conflicts with the comprehensive regulatory scheme for immigration and naturalization as enacted by the United States Congress.

IRREPARABLE HARM

22. Plaintiffs have no plain, adequate, or complete remedy at law to redress the wrongs alleged, and this suit for injunctive and declaratory relief is their only means of securing adequate relief. Plaintiffs are now suffering, and will continue to suffer, irreparable injury as a result of the operation of California Government Code Section 1031(a) as implemented by Defendants' refusal to hire non-citizens unless the operation of said statute and the conduct of Defendants' is enjoined by this Court.

ACTUAL CONTROVERSY

23. An actual and present controversy exists between the parties hereto which is in need of immediate resolution. Plaintiffs contend that Defendants' enforcement of California Government Code Section 1031(a) violates their right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and to the full and equal benefit of all laws as guaranteed by 42 U.S.C. Sections 1981 and 1983. Plaintiffs further contend that Defendants' actions as herein described violate their constitutional right to unabridged interstate travel and that the enforcement of said statute illegally encroaches upon an area of federal regulation in violation of the Supremacy Clause of the United States Constitution. Defendants contend in all respects to the contrary.

WHEREFORE, Plaintiffs pray that this Court:

1. Assume jurisdiction of this case.

2. Convene a three judge court pursuant to U.S.C. Sections 2281 and 2284.

3. Enter an order that this is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

4. Preliminarily and permanently enjoin Defendants from continuing and maintaining any policy or practice of requiring United States citizenship as a condition for employment in any peace officer position including, but not limited to, that of deputy probation officer.

5. Preliminarily and permanently enjoin the operation of California Government Code Section 1031(a).

6. Grant Plaintiff CHAVEZ-SALIDO injunctive relief by ordering his immediate appointment as a peace officer in the position of "Deputy Probation Officer II, Spanish-speaking" with the Los Angeles County Probation Depart-

ment and awarding Plaintiff appropriate back pay and seniority benefits.

7. Grant Plaintiff BOHORQUEZ injunctive relief by ordering Defendants to grant him a new employment examination for the peace officer position of Deputy Probation Officer II.

8. Grant Plaintiff YBARRA injunctive relief by ordering his immediate appointment as a peace officer in the position of Deputy Probation Officer I with the County of Los Angeles and awarding Plaintiff appropriate back pay and seniority benefits.

9. Enter a final judgment declaring that California Government Code Section 1031(a) is null and void as violative of the Constitution of the United States and 42 U.S.C. Sections 1981 and 1983.

10. Enter final judgment awarding to members of the class appropriate equitable relief in the form of back pay.

11. Award to Plaintiffs reasonable attorneys' fees, to be paid directly to their attorneys, and their costs of suit.

12. Award such further relief as the Court deems just and proper.

DATED: March 3, 1976.

DANIEL M. LUEVANO
ROSALYN M. CHAPMAN
JOHN McDERMOTT
RICHARD A. PAEZ
MICHELE WASHINGTON
ELENA H. ACKEL
By /s/ Richard A. Paez
RICHARD A. PAEZ
By /s/ Michele Washington
MICHELE WASHINGTON
Attorneys for Plaintiffs

EXHIBIT "A"

I hereby certify that I have been advised of the following conditions of employment as a Probation Trainee with the Los Angeles County Probation Department:

1) Eligibility to file an APPLICATION TO FILE PETITION FOR NATURALIZATION with the Immigration and Naturalization Service.

— OR —

2) Previous filing of an APPLICATION TO FILE PETITION FOR NATURALIZATION with the Immigration and Naturalization Service.

I also certify that I have been advised that, upon completion of the training program for Probation Trainees, I must be a U.S. citizen or be subject to termination as a Probation Trainee.

_____ _____

SIGNATURE DATE

Defendants' Answer to First Complaint as Modified.

In the United States District Court, Central District of California.

Jose Chavez-Salido, Ricardo Bohorquez, and Pedro Luis Ybarra, Plaintiffs, v. Clarence E. Cabell, et al., Defendants. Case No. CV-76-0541-IH.

Filed on May 14, 1976.

On April 23, 1976, plaintiffs and defendants agreed to strike certain portions of plaintiffs' first amended complaint. This Court subsequently approved such modification by order dated April 23, 1976.

Defendants hereby submit their answers to said first amended complaint as follows.

I.

Defendants deny each and every allegation specified in paragraphs 1, 2, 21 and 22 of the complaint.

II.

In answering paragraph 3 of the complaint, defendants admit jurisdiction is conferred upon this court by 28 U.S.C. Section 1343(3), but deny jurisdiction is conferred upon this court by 28 U.S.C. Section 1331.

III.

Defendants admit the allegations contained in paragraphs 4, 5, 13, 14, 15, 16, 19, 20 and 23 of the complaint.

IV.

Defendants allege they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6, 7, and 8 of the complaint.

V.

In answering paragraph 10 of the complaint, defendants admit that defendant Clarence E. Cabell was at the time the first amended complaint was filed the Acting Chief Probation Officer for the County of Los Angeles. Defendants further admit the Chief Probation Officer is the Chief Administrative Officer for the Probation Department and is ultimately responsible for all administrative decisions made within that department. Defendants deny the Chief Probation Officer has ultimate responsibility for all decisions relating to the employment of new deputy probation officers.

VI.

In answering paragraph 11 of the amended complaint, defendants admit that defendant Jacquelyn Hasenstab is the Personnel Officer for the Los Angeles County Probation Department. Defendants deny Jacqualyn Hasenstab has authority to make personnel decisions relating to the employment of new deputy probation officers.

VII.

In answering paragraph 12 of the amended complaint, defendants admit defendant Gordon T. Nesvig was, at the time this first amended complaint was filed, the Chief Personnel Officer for the County of Los Angeles. Defendants deny the Chief Personnel Officer for the County of Los Angeles has ultimate responsibility for all personnel practices and decisions made for the County of Los Angeles including those decisions which relate to the employment of persons in peace officer positions.

VIII.

In answering paragraph 17 of the first amended complaint, defendants deny that plainitff Chavez-Salido will be terminated from his employment with the Los Angeles

County Probation Department by May 1, 1976. Defendants admit the balance of the allegations contained in paragraph 17 of the complaint.

IX.

In answering paragraph 18 of the first amended complaint, defendants deny that plaintiff Bohorquez had his examination underscored on the basis of his alien status. Defendants admit the balance of the allegations contained in paragraph 18 of the complaint.

FIRST DEFENSE

A public entity is not a "person" under the Federal Civil Rights Act.

SECOND DEFENSE

Defendants acted at all times in good faith and with the reasonable belief their actions were valid.

THIRD DEFENSE

There is no imputed liability between public officers in actions under the Federal Civil Rights Act.

FOURTH DEFENSE

There is no imputed liability between a public officer and his employing public entity in actions under the Federal Civil Rights Act.

FIFTH DEFENSE

There are legitimate state interests underlying California Government Code Section 1031 and California Penal Code Section 830.5.

SIXTH DEFENSE

There are compelling state reasons underlying and justifying California Government Code Section 1031 and California Penal Code Section 830.5.

SEVENTH DEFENSE

Plaintiffs have a constitutionally protected right to employment as a peace officer.

EIGHTH DEFENSE

Defendants have the right to establish reasonable qualifications as conditions for public employment, especially peace officer positions.

WHEREFORE, defendants respectfully pray as follows:

1. Plaintiffs take nothing by this action.

2. That this court refrain from issuing any preliminary or permanent injunctive relief regarding defendants' policies or practices of employment of peace officers including deputy probation officers.

3. That this court enter a final judgment upholding the constitutionality of California Government Code Section 1031(a).

4. That this court deny any award to plaintiffs of reasonable attorney's fees to be paid directly to plaintiffs' attorneys or for costs in maintaining this suit.

5. That defendants recover their costs in defending this action.

6. For such other and further relief as to this Court seems just and proper.

DATED: May 14, 1976

Respectfully submitted,
JOHN H. LARSON
County Counsel
By /s/ Philip H. Hickok
PHILIP H. HICKOK
Deputy County Counsel
Attorneys for Defendants

Joint Stipulation of Facts; Factual and Legal Issues to Be Tried.

United States District Court Central District of California.

Chavez-Salido, et al., Plaintiffs, vs. Clarence E. Cabell, et al., Defendants. Civil Action Civ. No. 76-0541 IH.

I.

JOINT STIPULATION OF FACTS

1. This action arises under the provisions of the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1983. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343(3) and (4) which grant district courts original jurisdiction over any action which seeks to redress deprivation, under color of state law, of any rights, privileges or immunities secured by the Constitution of the United States.

2. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. 2281 and 2284.

3. California Government Code Section 1031 provides, in relevant part:

> "Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:
>
> (a) Be a citizen of the United States."

4. California Penal Code Section 830.5 declares that, by law, probation officers and deputy probation officers are peace officers.

5. California Welfare and Institutions Code section 1076 declares that the officers and employees of each institution for delinquents shall have the power and authority of peace officers listed in Section 830.5 of the Penal Code.

6. California Welfare and Institutions Code Section 6778 declares that every counselor, assistant counselor, and

deputy counselor in mental health shall have the powers of a peace officer.

7. Pursuant to the above enumerated California statutory provisions, defendants have established as a continuing policy and practice the requirement of United States citizenship as a condition for employment in any peace officer position for the County of Los Angeles, including the positions of probation officers, parole officers, mental health counselors and officers and employees in institutions for delinquents.

8. Plaintiff JOSE CHAVEZ-SALIDO is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff CHAVEZ-SALIDO was born in Juarez, Mexico on May 25, 1949, and has been a permanent legal resident of the United States since 1955. Plaintiff CHAVEZ-SALIDO'S Alien Registration Receipt Number is A8-991-817.

9. Plaintiff CHAVEZ-SALIDO attended Santa Fe High School in Los Angeles County, and thereafter graduated from California State College at Long Beach in August, 1975, with a Bachelor of Arts degree in Mexican-American Studies.

10. On March 27, 1975, plaintiff CHAVEZ-SALIDO applied to the Los Angeles County Department of Personnel for the position of Deputy Probation Officer II, Spanish-speaking. At the time he submitted his application he indicated on the application form that he was not an American citizen; upon filing the application plaintiff CHAVEZ-SALIDO showed his alien registration card to the clerk.

11. On May 1, 1975, plaintiff CHAVEZ-SALIDO took the oral examination for Deputy Probation Officer II, Spanish-speaking. Approximately two weeks later he received a notice from the Los Angeles County Department of Per-

sonnel that he had scored 95 on the examination and that his name was being placed upon the upcoming eligibility list for the position of Deputy Probation Officer II, Spanish-speaking.

12. In September of 1975, plaintiff CHAVEZ-SALIDO was notified by Los Angeles County of a job opening as Deputy Probation Officer II, Spanish-speaking at a monthly salary of $1,185.00. On or about September 8, 1975, plaintiff met with Mr. John Terao in the Personnel Office of the Probation Department. At that time he was advised by Mr. Terao that he would be required to show proof of: (1) a college degree and (2) United States citizenship, prior to receiving his appointment as a probation officer. Plaintiff CHAVEZ-SALIDO was unable to produce the requisite proof of citizenship.

13. Plaintiff CHAVEZ-SALIDO was thereafter advised by Mr. Terao that it was the policy of Los Angeles County that all probation officers be United States citizens at the time of their appointment. Plaintiff was informed that, due to this policy, the Probation Department would not be able to offer him employment in the position of Deputy Probation II, Spanish-speaking. Plaintiff CHAVEZ-SALIDO was thereby denied employment with the County of Los Angeles soley upon the basis of his alien status.

14. On September 11, 1975, plaintiff CHAVEZ-SALIDO filed an application with the Los Angeles County Probation Department for the position of Deputy Probation Officer Trainee at a monthly salary of $842.45. On the same day, plaintiff CHAVEZ-SALIDO took the oral examination for this position and received a score of 100.

15. On November 27, 1975, plaintiff CHAVEZ-SALIDO was contacted by Ms. Monica Smith of the Los Angeles County Probation Department and was informed that he was

eligible for a job opening as Deputy Probation Officer Trainee. Plaintiff was further informed by Ms. Smith that as a condition of such employment he would have to file a Petition for Naturalization with the United States Immigration Service (INS) or certify that such an application had previously been filed with the INS. Plaintiff was also informed that upon completion of a six month training period he would either have to be a United States citizen or he would be subject to termination. Plaintiff CHAVEZ-SALIDO at that time had a Petition for Naturalization pending with the INS and was therefore able to accept the conditional employment as a Deputy Probation Officer Trainee.

16. Plaintiff CHAVEZ-SALIDO commenced employment with the Los Angeles County Probation Department as a Deputy Probation Officer Trainee on or about December 1, 1975 at a monthly salary of $842.45. As of this date there has been no change in the salary scale for Deputy Probation Officer Trainee or Deputy Probation Officer II.

17. On or about March 15, 1976, plaintiff CHAVEZ-SALIDO became a United States citizen.

18. The position of Deputy Probation Officer Trainee does not require deputization as a "peace officer."

19. Plaintiff PEDRO LUIS YBARRA is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff YBARRA was born in Lacabe, Spain on June 21, 1938, and has been a permanent legal resident of the United States since 1972. His Alien Registration Receipt number is A19-906-241.

20. Plaintiff YBARRA graduated from Camillas University, Spain in June of 1960 with a Bachelor of Arts degree in Theology. Plaintiff graduated from the University of California at Los Angeles with a Masters of Arts degree in African Studies in June of 1970. Plaintiff YBARRA is

currently working towards the completion of a second Master of Arts degree in Sociology at Cal State University at Northridge.

21. On August 22, 1975 plaintiff YBARRA applied for the position of Deputy Probation Officer Trainee and on September 3, 1975 he took the examination for that position.

On August 22, 1975 he also applied for the position of Deputy Probation Officer II, and on November 6, 1975 he took the examination for that position. Finally on October 8, 1975 plaintiff YBARRA applied for and on that same day took the examination for Deputy Probation Officer Trainee.

22. On September 10, 1975, plaintiff YBARRA received notification by mail that he had scored 88 on the Deputy Probation Officer Trainee Examination. On or about November 11, 1975, he received notification, by mail that he had passed the examination for Deputy Probation Officer II with a score of 70. On October 6, 1975, he received notification that he had achieved a score of 80 on the Deputy Probation Officer II examination. Plaintiff YBARRA was subsequently placed on the eligibility lists for all three positions.

23. On or about January 19, 1976, plaintiff YBARRA received notification from the Personnel office of the Los Angeles County Probation Department of a job opening as Deputy Probation Officer II. Plaintiff thereafter immediately met with Mr. John Terao in the Personnel office of the Probation Department and was advised that although the Deputy Probation Officer II positions were no longer available, Plaintiff was qualified for one of the Deputy Probation Officer I positions.

24. Plaintiff YBARRA indicated to Mr. Terao that he would accept the Probation Officer I position, whereupon

Mr. Terao requested that Plaintiff present his college degree and proof of United States citizenship in order to qualify for appointment as a deputy probation officer. Plaintiff YBARRA, a resident alien was unable to comply with the citizenship requirement. Plaintiff YBARRA was thereafter denied employment with Los Angeles County solely upon the basis of his alien status.

25. The starting salary for a Deputy Probation Officer I, in January 1976, was $1,002.18 per month. As of this date, there has been no change in the salary scale for Deputy Probation Officer I.

26. Plaintiff RICHARDO BOHORQUEZ is a lawfully admitted resident alien currently residing in the County of Los Angeles, State of California. Plaintiff BOHORQUEZ was born in the Republic of Columbia on February 8, 1938, and has been a permanent legal resident of the United States since 1961. His Alien Registration Receipt Number is A-13-052-095.

27. Plaintiff BOHORQUEZ graduated from the University of California at Los Angeles with a Bachelor of Arts degree in Latin American Studies in March of 1975.

28. In January of 1975, plaintiff BOHORQUEZ filed an application for employment with the County of Los Angeles for the peace officer position of Deputy Probation Officer II, Spanish-speaking.

29. On May 5, 1975, plaintiff BOHORQUEZ was interviewed in an oral examination by Mr. Edward Martinez and Mr. Raul Solis. At the conclusion of the examination there was an extended discussion regarding plaintiff's non-citizen status. Plaintiff was advised by Mr. Solis that despite his score on the oral interview he would not be able to receive an appointment as a deputy probation officer because

he was not a United States citizen and therefore could not be deputized as a peace officer.

30. On or about May 10, 1975, plaintiff BOHORQUEZ received notification by mail from the Personnel Office of the Los Angeles County Probation Department that he had failed to achieve the passing score of 70 for his oral examination. Plaintiff was further informed by the Personnel Department that it would be useless to appeal the examination results because there is a Los Angeles County policy which prohibited the appointment of non-citizens to deputy probation officer positions.

31. Plaintiff BOHORQUEZ was eliminated from further consideration for employment as a Deputy Probation Officer because of the low score which he received in the oral employment examination.

32. Plaintiff BOHORQUEZ is desirious of gaining employment as a deputy probation officer with the County of Los Angeles. As a result of the citizenship requirement, plaintiff BOHORQUEZ has refrained from filing any further applications for deputy probation officer or any other peace officer position with the County of Los Angeles.

33. Pursuant to 42 U.S.C. §§ 1981 and 1983 Plaintiffs CHAVEZ-SALIDO, YBARRA and BOHORQUEZ seek declaratory and injunctive relief enjoining the enforcement of California Government Code § 1031 (a) and the consequent policy and practice of defendants of requiring as a condition of employment in peace officer positions that the applicant for said position be a United States citizen.

34. Defendant CLARENCE E. CABELL, was at the time of filing of the First Amended Complaint the Acting Chief Probation Officer for the County of Los Angeles and as such was the Chief Administrative Officer for the Probation Department and is ultimately responsible for all ad-

ministrative decisions made within that Department. Since the filing of the First Amended Complaint, KENNETH FARE has succeeded to the position of Chief Probation Officer for the County of Los Angeles.

35. Defendant JACQUELINE HASENSTAB is, and at all times relevant hereto has been, the Personnel Officer for the Los Angeles County Probation Department.

36. Defendant GORDIN T. NESVIG was, and at the time of filing of the First Amended Complaint the Chief Personnel Officer for the County of Los Angeles. Since the filing of the First Amended Complaint, has succeeded to the position of Chief Personnel Officer for the County of Los Angeles.

37. Defendant COUNTY OF LOS ANGELES is, and at all times relevant hereto has been a governmental entity duly organized and existing under and by virtue of the laws of the State of California. Plaintiffs do not seek any relief directly against the County under 42 U.S.C. § 1983.

38. At all times relevant hereto Defendants were acting under color of State law.

II
ISSUES OF FACT AND LAW TO BE TRIED

Because most of the issues in this case remaining to be tried are combinations of fact and law, it is appropriate to state factual and legal issues together. The factual and legal issues to be tried in this case are as follows:

1. Whether jurisdiction is proper under 28 U.S.C. § 1331.

2. Whether California Government Code Section 1031 (a) denies lawful resident aliens equal protection of the laws

as guaranteed by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Sections 1981 and 1983.

3. Whether there is any compelling state interest which justifies the requirement of citizenship as a condition of employment as a peace officer.

4. Whether there is any rational basis for the citizenship requirement.

5. Whether California Government Code Section 1031 (a) unlawfully infringes upon the constitutional right to travel.

6. Whether California Government Code Section 1031 (a) infringes upon the power of Congress to regulate aliens and is therefore violative of the Supremacy Clause of the U.S. Constitution.

7. Whether there is imputed liability between public officers in action under the Federal Civil Rights Acts.

8. Whether there is imputed liability between a public officer and his employing public entity in actions under the Federal Civil Rights Acts.

9. Whether plaintiffs have a constitutionally protected right to employment as a peace officer.

10. What relief should be granted should the Court find that California Government Code section 1031 (a) and the consequent policy of defendants is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. Sections 1981 and 1983. Relevant to this issue are the following sub-issues:

A. Whether the County of Los Angeles is a proper defendant under 42 U.S.C. § 1981.

B. Whether the County of Los Angeles is a proper defendant in a claim for relief based on the Fourteenth Amendment to the United States Constitution.

C. Whether Plaintiffs CHAVEZ-SALIDO and YBARRA are entitled to a monetary award for loss of pay and appointment, retroactively to the date of rejection, to the positions for which they applied but were denied solely because they were not United States citizens.

D. If the answer to the sub paragraph immediately above is in the affirmative what should be the amount of the monetary award for each plaintiff.

E. Whether this action is moot as to plaintiff CHAVEZ-SALIDO.

F. What efforts if any have been made to obtain other employment, including other government employment.

G. If employment has been obtained to what extent should their wages be off set against any judgment awarded in this case.

H. Whether plaintiff BOHORQUEZ' oral examination was prejudiced by the discussion concerning his alien status. If so, whether he is entitled to retake the examination, and be restored, retroactively, to the eligibility list for the May, 1976 examination.

I. Whether defendant County officials acted in good faith with the reasonable belief that their actions were valid and whether said conduct may bar the recovery of lost pay and appointment to the positions to which plaintiffs applied but were rejected.

J. Whether or not the prevailing parties in this action are entitled to an award of costs; if so, the amount of such costs.

DATED: June 4, 1976

DANIEL M. LUEVANO
ROSALYN M. CHAPMAN
JOHN E. McDERMOTT
RICHARD A. PAEZ
MICHELLE WASHINGTON
ELENA H. ACKEL

By: /s/ Richard A. Paez
RICHARD A. PAEZ
Michelle Washington
MICHELLE WASHINGTON
Attorneys for Plaintiffs

DATED: June 4, 1976

JOHN H. LARSON
County Counsel
PHILIP H. HICKOK
Deputy County Counsel
By: Philip H. Hickok
PHILIP H. HICKOK

Affidavit of Jose Chavez-Salido.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiffs, vs. Clarence E. Cabell, et al., Defendants. Civil Action, Civ. No. 76-0541-IH, (Three-Judge Ct.: JWC & SNB).

State of California, County of Los Angeles — ss.

Filed on July 2, 1976.

I, JOSE CHAVEZ-SALIDO, being first duly sworn, depose and say:

1. On September 8, 1975, I was denied employment as a Deputy Probation Officer II Spanish-Speaking by the Los Angeles County Probation Department solely because I was not a United States citizen. At that time, I was unemployed and had been seeking work for several months.

2. Between September 8, 1975 and the time I was hired by the Los Angeles County Probation Department as a Deputy Probation Officer Trainee in late November, 1975, I sought employment with numerous public and private employers. Among others, I applied for the following positions: (1) Eligibility Worker I with the Los Angeles County Department of Public Social Services; (2) Community Services Coordinator with the Los Angeles County Department of Mental Health; (3) Employment Counselor with the California Employment Development Department; (4) Job Developer, Equal Employment Opportunities Representative and Counselor, all of which were positions with the Rio Hondo Area Community Action Council; (5) as a laborer with Stauffers Chemical, Inc.; and (6) as a Deputy Probation Officer Trainee with the Los Angeles County Probation Department. All of my efforts to seek employment, with the exception of the Deputy Probation Officer Trainee position, during this period, were unsuccessful.

3. During the same period, I attempted to collect unemployment insurance benefits but the California Employment Development Department informed me that I was ineligible for unemployment insurance because I did not satisfy the prior earnings requirement.

4. On November 27, 1975, I was hired by the Los Angeles County Probation Department as Deputy Probation Officer Trainee at a monthly salary of $852.00. Unlike the DPO II position, the trainee position did not require that I be deputized as a "peace officer" and the position for which I was hired was not a permanent full-time position. The trainee position is funded under the Comprehensive Employment Training Program ("CETA") and its continued existence is dependent upon funding by the federal government. The DPO II-Spanish-Speaking position for which I applied but was rejected, solely because I was not a United States citizen, was a permanent full-time position. Although my salary as a trainee is $852.00 a month, as a CETA employee, I do not receive the same employee benefits as a regular county employee. For example, as a Probation Officer Trainee — CETA, I am ineligible for county life insurance, lay-off benefits, severance pay, unemployment insurance, bilingual pay bonus, promotions, and pay-steps advances. However, as a regular county employee I would be eligible for all of these benefits.

5. I am, at this time, still desirous of obtaining a Deputy Probation Officer II - Spanish-Speaking position. If offered such a position, I would accept it. Furthermore, I have no reservations in subscribing to any loyalty as required by the County of Los Angeles. In fact, at the time I was hired as a Deputy Probation Officer Trainee, I was required to subscribe to the County's loyalty oath.

DATED: June 30, 1976

/s/ Jose Chavez-Salido
JOSE CHAVEZ-SALIDO
Affiant

Subscribed and sworn to before
me on this 30th day of June, 1976.

/s/ Danie J. Kinsey
NOTARY PUBLIC FOR THE
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

Affidavit of
Pedro Luis Ybarra.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiffs, vs. Clarence E. Cabell, et al., Defendants. Civil Action, Civ. No. 76-0541-IH, (Three-Judge Ct.: JWC & SNB).

State of California County of Los Angeles — ss.

Filed on July 2, 1976.

I, JOSE LUIS YBARRA, being first duly sworn, depose and say:

At the time I was denied employment with the County of Los Angeles Probation Department as a Deputy Probation Officer, Spanish-Speaking, I was employed by the Housing Authority of the City of Los Angeles as an Eligibility and Occupancy Interviewer at a monthly salary of $889.00. I am presently employed in the same capacity but my salary has increased, as of February 1, 1976 to $911.00 per month.

Although presently employed, I am very anxious to obtain employment as a Deputy Probation Officer with the Los Angeles County Probation Department and if offered a position, I would accept it. Furthermore, even though I am not a United States citizen at this time and do not have a petition for naturalization pending before INS, I have no hesitation and would willingly sign and subscribe to any loyalty oath required by the County of Los Angeles.

DATED: 7-2-76, 1976

/s/ Pedro Luis Ybarra
PEDRO LUIS YBARRA
Affiant

Subscribed and sworn to before me
on this 2nd day of June, 1976.

/s/ W. Kenneth Rice
NOTARY PUBLIC FOR THE
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

Affidavit of Ricardo Bohorquez.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiffs, vs. Clarence E. Cabell, et al., Defendants. Class Action, Civ. No. 76-0541-IH, (Three-Judge Ct.: JWC & SNB).

State of California County of Los Angeles — ss.

Filed on July 2, 1976.

I, RICARDO BOHORQUEZ, being first duly sworn, depose and say:

1. On or about January 15, 1975, I filed an application with Los Angeles County for employment as Deputy Probation Officer II, Spanish-Speaking.

2. On or about May 5, 1975, I was interviewed in an oral examination by Mr. Ed Martinez and Mr. Raul Solis. During the course of the examination I was asked questions pertinent to the duties of a Deputy Probation Officer II which I answered accurately since I had been working in that type of a job situation under a salaried work-study program as well as on a voluntary basis.

3. At the conclusion of the examination Mr. Solis stated that there would be a problem in deputizing me for the position because I was not a United States citizen. After a lengthy discussion of the matter, both Mr. Solis and Mr. Martinez concluded that United States citizenship was a requirement for the position for which I was being interviewed.

4. Immediately prior to leaving the examination room I asked Mr. Solis whether there was a practical solution to this problem regarding any citizenship status. He replied that the position I had applied for could possibly be held open until the matter was clarified.

5. On or about May 10, 1975, I received a notice from the Los Angeles County Probation Department that I had failed to achieve a passing score for the oral examination. The passing score was 70 and I received a score of 65.

6. At the time that I received notification of the examination results I was working as a voluntary probation aid at the Los Compadres facility. My supervisor, Mr. Ernest Gonzales, telephoned the Los Angeles County Personnel Department and was informed that one of the reasons for my low score was my non-citizen status.

7. I thereafter requested information regarding the process for appealing my examination results. Mr. Gonzales and I were then informed by the Personnel Department that it would be useless to appeal the results because there was a general County policy which prohibited the appointment of non-citizens to deputy probation officer positions.

8. Since I was denied employment as a Deputy Probation Officer, I have not been able to secure permanent full-time work. During this time I received unemployment insurance compensation from the California State Department of Employment Development. In total, I received unemployment compensation for 36 weeks at the rate of $45.00 per week.

10. Even though I presently do not have a Petition for Naturalization pending before the Immigration and Naturalization Service, I would be willing to sign any loyalty oath which is required by Los Angeles County or the State of California. Once I have secured permanent full-time employment, I intend to petition for naturalization.

Dated this 2nd day of July, 1976.

/s/ Ricardo Bohorquez
RICARDO BOHORQUEZ
Affiant

Subscribed and sworn to before me
this 2nd day of July, 1976.

/s/ Danie J. Kinsey
NOTARY PUBLIC FOR THE
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

Opinion.

Jose Chavez-Salido et al., Plaintiffs, v. Clarence E. Cabell, in his official capacity as Acting Chief Probation Officer of Los Angeles County, et al., Defendants. No. CV 76-0541-1H.

United States District Court, C. D. California. Feb. 3, 1977.

Addendum to Opinion March 14, 1977.

Resident aliens, who sought employment as deputy probation officers, brought suit challenging a California statute providing that one must be a citizen of the United States to hold any governmental position, state, county or local, which is declared by law to be a peace officer or which has the powers of a peace officer. A Three-Judge District Court, Irving Hill, J., held that the statute denied equal protection on its face and as applied to the resident aliens.

Partial judgment for plaintiffs.

Richard A. Paez, Michele Washington, Western Center on Law and Poverty, Inc., Los Angeles, Cal., for plaintiffs.

Philip H. Hickok, Deputy County Counsel, Los Angeles, Cal., for defendants.

Before BARNES, Senior Circuit Judge, CURTIS, Senior District Judge, and IRVING HILL, District Judge.

HILL, District Judge:

In this opinion, in a case of first impression, we declare unconstitutional California Government Code § 1031(a). That section provides that one must be a citizen of the United States to hold any governmental position, state, county or local, which is declared by law to be a peace officer or which has the powers of a peace officer. The case is brought by three plaintiffs who applied for, and were denied, appointment to the position of Los Angeles County deputy

probation officer solely because of the statutory requirement of American citizenship. Under California Penal Code § 830.5 a deputy probation officer is declared to be a peace officer and is therefore subject to the citizenship requirement of Government Code § 1031(a). We hold § 1031(a) to be both unconstitutional on its face and unconstitutional as applied. We also hold that a county may be held liable for damages in an action brought directly under the 14th Amendment and in an action brought under 42 U.S.C. § 1981.

I.

FACTS.

Plaintiffs, Chavez-Salido, Ybarra and Bohorquez, as of the date the complaint was filed, were lawfully admitted permanent resident aliens living in Los Angeles County. In a single-count first amended complaint seeking both injunctive relief and damages, they sue Los Angeles County, its Chief Personnel Officer, its Acting Chief Probation Officer and the Personnel Officer of the County's Probation Department.[1] The case was tried without live witnesses. Most of the facts were stipulated to and some additional facts were received by uncontradicted affidavits.

Each of the plaintiffs has applied for appointment to the County Probation Department as a Deputy Probation Officer II. This position carries a salary of $1,185 per month. There are some factual differences in the status of the three plaintiffs and in the treatment accorded their applications.

---

[1]Defendant Nesvig has been succeeded as Chief Personnel Officer of the County by Harry L. Hufford. Defendant Cabell has been succeeded as Chief Probation Officer of the County by Kenneth Fare. In both situations the present incumbent has been substituted for his predecessor under Fed.R.Civ.P. 25(d)(1).

Chavez-Salido has resided here as a lawfully admitted permanent resident alien since 1955. His application to become a Deputy Probation Officer II was filed on March 27, 1975. An oral examination is given for this position, with 70 being the minimum passing grade. Chavez-Salido took the examination May 1, 1975, scored 95, and was notified that he was being placed on the eligibility list. In September, 1975, he was notified that a job opening existed. But shortly thereafter he was told he would have to show proof of citizenship to receive an appointment. Being unable to do so, he was denied employment. The denial is stipulated to have been solely the result of the citizenship requirement of Government Code § 1031(a).

The County also has a position called Deputy Probation Officer Trainee, paying substantially less than Deputy Probation Officer II. The Trainee position does not require citizenship since it is not given by law the status or powers of peace officer. Chavez-Salido was offered the Trainee position on December 1, 1975, and accepted it. He had applied for American citizenship well before applying to become a probation officer. His citizenship petition was granted and he was made a citizen on March 15, 1976. However, by that time, his name had been taken off the eligibility list for Deputy Probation Officer II. In August, 1976, he was promoted to the position of Deputy Probation Officer I. The Officer I position pays more than the Trainee position but less than the Officer II position and citizenship is required for it.

Plaintiff Ybarra has been a lawfully admitted permanent resident alien since 1972. On August 22, 1975, he applied for the position of Deputy Probation Officer II. He scored 70 on the examination. On the same date Ybarra also applied for the trainee position. On October 8, 1975, he applied for the position of Deputy Probation Officer I. He passed the

Officer I examination with a score of 80. He was told that he was qualified for both probation officer positions, that there was a job open in the I category, but no job was open in the II category although he would be placed on an eligibility list for the latter. He was also told that for both probation officer positions he was required to present proof of citizenship. Being unable to do so, he was denied the Officer I appointment and a position on the eligibility list for Officer II. It is again stipulated that these denials were solely the result of the statutory citizenship requirement. Ybarra was employed by the Los Angeles City Housing Authority during the entire application and examination period and apparently is still so employed. Ybarra has not to this date applied for American citizenship.

Plaintiff Bohorquez has been a lawfully admitted permanent resident alien since 1961. At the time the case was argued, he had never applied for American citizenship and, so far as we know, has still not done so. His application for the position of Deputy Probation Officer II was filed January, 1975. He was given the oral examination on May 5, 1975 but during the examination was told that he could not receive an appointment to the position sought because of his lack of citizenship. He was subsequently notified that he had failed to achieve a passing score of 70 on the examination. There is a procedure whereby an applicant can appeal his examination results. Bohorquez was notified that because he failed to meet the citizenship qualifications it would be useless to appeal. He therefore did not appeal and has refrained from filing further applications, though he is still desirous of appointment. Bohorquez was unemployed at the time of his application and examination and has remained unemployed since. It appears that he never sought appointment as a Probation Officer Trainee. Whereas Chavez-Salido and Ybarra seek damages by way of

back pay as part of their relief. Bohorquez seeks only the opportunity to take a new examination.

Each plaintiff was at all times willing to take the loyalty oath prescribed in the California Constitution for all public employees. Cal.Const. art. XX, § 3. That oath includes an agreement to support and defend the Federal and State Constitutions.

The first amended complaint, upon which the case was tried,[2] challenges § 1031(a) and the citizenship requirement therein contained, under the equal protection clause of the 14th Amendment and under two provisions of the Civil Rights Acts, 42 U.S.C. §§ 1981 and 1983. These challenges articulate a claim of unlawful discrimination on the basis of alienage. In addition, the complaint asserts that § 1031(a) unconstitutionally infringes upon plaintiffs' right to travel and upon Congress' power to regulate aliens. The latter claim invokes the supremacy clause of the Federal Constitution. Each plaintiff seeks a declaratory judgment invalidating the statute and injunctive relief prohibiting its application to him. All three plaintiffs seek attorneys fees. As stated, two plaintiffs seek money damages.

Plaintiffs requested the convening of a three-judge court under 28 U.S.C. §§ 2281 and 2284[3] Defendants agreed that a three-judge court should be convened and the Chief Judge of the Circuit appointed the members of the three-judge

---

[2]The first amended complaint was originally drawn as a class action. Before the trial, by stipulation of all parties, an order was entered striking all class action claims and aspects.

[3]During the pendency of the action, Congress enacted new legislation substantially limiting the availability of three-judge courts. The Three-Judge Court Amendments of 1976, Pub.L. No. 94-381, 90 Stat. 1119. The new law by its terms does not apply to actions commenced before its enactment, i.e. August 2, 1976, and thus the instant case was unaffected by the new statute.

court on April 26, 1976.[4] The case was tried and argued August 20, 1976.

II.

JURISDICTION.

The individual defendants do not contest the jurisdiction of this court to entertain the instant action against them. They apparently concur in plaintiffs' assertion that a claim is stated against them which is cognizable under 42 U.S.C. § 1983, with jurisdiction accruing to this Court under 28 U.S.C. § 1343(3). Section 1983 imposes liability on any *person* who, under color of state law, deprives another of "any rights, privileges, or immunities secured by the Constitution . . . ." Section 1343(3) grants to the district courts original jurisdiction to redress any deprivation of constitutional rights of the type described in § 1983.

---

[4]We are aware, of course, of the teaching of the Supreme Court in *Hagans v. Lavine*, 415 U.S. 528, 95 S.Ct. 1372, 39 L.Ed.2d 577 (1974). *Hagans* holds that before resorting to a three-judge court, the single district judge should exhaust all potentially dispositive claims within his jurisdiction. The claim in the instant case of invalid state intrusion into the federal power to regulate immigration is not based on any alleged conflict between § 1031(a) and any specific federal law or regulation. Plaintiffs refer only generally to the Immigration and Naturalization Act, 8 U.S.C. § 1101 *et seq.* *Hagans* describes a claim that direct conflict between a specific state statute and a specific Congressional enactment renders the state statute "unconstitutional". The opinion in *Hagans* denominates such a conflict claim as "statutory" and differentiates it from a claim of a clearly constitutional nature. *Hagans* holds that the single district judge must decide such a statutory claim before requesting that a three-judge court be convened to consider other claims. The supremacy clause claim of the plaintiffs here, like their other claims of unconstitutionality, derives "exclusively and directly from the Federal Constitution rather than from federal legislation [and] entail[s] an immediate resort to the Constitution . . . ." *Norwick v. Nyquist*, 417 F.Supp. 913, 916 (S.D.N.Y. 1976). All of the claims of the instant plaintiffs are of a clearly constitutional nature. None of the claims is "statutory" in the *Hagans* context. Therefore, in our view, a three-judge court was properly convened.

But Defendant Los Angeles County does contest our jurisdiction. Plaintiffs argue that their complaint states a claim against the County both for violation of their equal protection rights under the 14th Amendment and for violation of 42 U.S.C. § 1981. Section 1981 in relevant part reads:

> "All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts, to sue, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . ."

Plaintiffs argue that if a claim is stated under either or both of these bases, our jurisdiction over the County derives from 28 U.S.C. § 1331(a), the general grant to the district courts of federal question jurisdiction. Section 1331(a) confers jurisdiction in all civil actions which arise "under the Constitution, laws, or treaties of the United States" and "wherein the matter in controversy exceeds the sum of value of $10,000 . . . ."

Defendant County strongly urges that it, as a political subdivision, is not suable under § 1981. The County unfortunately took no position, either in its brief or in argument, as to plaintiffs' asserted alternative basis of liability, i.e. direct violation of the 14th Amendment. We have examined both bases as well as the question of the existence in the case of the $10,000 amount in controversy requirement under § 1331(a).

We hold that the complaint states a cognizable claim against the County on both 14th Amendment and § 1981 grounds and that the amount in controversy exceeds $10,000. Therefore, we hold that this court has jurisdiction of the claim against the County under § 1331(a).

(A) *The Section 1981 Claim*

It is settled that the right to be free from illegal discrimination in employment is encompassed within the right "to make and enforce contracts" protected by § 1981. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). *Johnson* involved racial discrimination in employment. In *Graham v. Richardson*, 403 U.S. 365, 277, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) the Supreme Court held that aliens are within the class protected by § 1981 and may utilize that section as plaintiffs. *Graham* involved welfare benefits. Although neither the Supreme Court nor our Circuit have spoken on the question of alienage discrimination in employment, the Fifth and Seventh Circuits in carefully considered opinions, and a number of district courts, have held that § 1981 applies to discrimination in employment based on alienage as well as to employment discrimination which is racially based.[5] We choose to follow those holdings.

So we turn to the question of whether an action under § 1981 may be maintained against a political subdivision of a state.

Since *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) it has been established law that a political subdivision of a state is immune from a damage claim under § 1983 because it is not a "person". And that im-

---

[5]*Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); *Roberto v. Hartford Ins. Co.*, 177 F.2d 811 (7th Cir. 1949), *cert. denied*, 339 U.S. 920, 70 S.Ct. 622, 94 L.Ed. 1343 (1950); *Spiess v. C. Itoh & Co. (America), Inc.*, 408 F.Supp. 916 (S.D. Tex. 1976); *Hollander v. Sears, Roebuck & Co.*, 392 F.Supp. 90 (D.Conn. 1975); *Mohamed v. Parks*, 352 F.Supp. 581 (D.Mass. 1973); *Lopez v. White Plains Housing Authority*, 355 F.Supp. 1016 (S.D.N.Y. 1972); *League of Academic Women v. Regents of Univ. of Calif.*, 343 F.Supp. 636 (N.D.Cal. 1972). *Cf. Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976).

munity has been extended to claims for injunctive relief. *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973).

Since §§ 1981 and 1983 are parts of what is generally called the Civil Rights Acts, it is tempting to argue that a political subdivision's immunity from suit under one section extends to the others. And our Circuit in *Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972) appears to have accepted that argument, holding that a political subdivision is also not amenable to suit under § 1981. The County's claim that it cannot be sued under § 1981 is founded almost exclusively on *Arunga*.

We have pondered the *Arunga* opinion and in so doing, we have examined the record and the briefs. We believe, with the utmost respect, that *Arunga* may have been insufficiently considered and that it reaches an incorrect result. One district court in this district has previously declined to follow *Arunga*, *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal. 1976), and we do likewise. We also believe that whatever authority *Arunga* has, has been undermined by language in a more recent decision of the Supreme Court.

Arunga was an action brought in *pro. per.* by a black legally admitted resident alien of Kenyan nationality. He sued the City of Alameda and one of its police officers (who was never served) for a claimed physical assault arising out

of an allegedly unlawful arrest.[6] The trial court twice granted thr City's motion to dismiss for lack of jurisdiction. The first grant was with permission to amend, and following submission of an amended complaint, the second dismissal was granted without leave to amend. The appeal followed. In the Court of Appeals the matter was submitted without

---

[6]Arunga's papers throughout the record demonstrate that he was both unlearned and confused. The amended complaint is in one count; its jurisdictional paragraph cites only § 1983. A later paragraph merely mentions §§ 1981 and 1985 along with § 1983. The complaint does not mention § 1986 at all. The gravamen of the complaint is a prayer for money damages of $1.5 million dollars as general and exemplary damages for the assault upon plaintiff and his physical and mental suffering. Some of the damages sought for mental suffering are claimed to be for the emotional effect upon plaintiff of his grandfather's premature death resulting from the "humiliation" to plaintiff. Plaintiff denominated his case as a class action and for some obscure reason prayed that a three-judge court be convened for the purpose of declaring unconstitutional Article 11, Section 11 of the California Constitution which confers local police power upon counties and cities.

In the City's original motion to dismiss, the points and authorities supporting it consisted of one sentence which asserted that "a city is not a 'person' under 42 U.S.C. §§ 1981-88". The motion to dismiss the amended complaint was likewise supported by a single sentence argument as follows:

> "Plaintiff's AMENDED PLEADING' adds nothing except jibberish and still fails to state a cause of action against the City." *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968).

Diamond and Brown are both § 1983 cases declaring municipal immunity. The trial court in neither of its dismissal orders cited any authority or stated any reason.

Arunga's brief on appeal does not mention § 1981 and does not even mention the suability of a political subdivision under any of the Civil Rights Acts. His brief is almost entirely devoted to the three-judge court issue and a discussion of state police power. The city's brief on appeal devotes only seven lines to the suability question, as follows:

> "It is clear that a City may not be sued under 42 U.S.C. §§ 1981-85. *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1961); *Moor v. Madigan* [458], F.2d [1217] (9th Cir. No. 71-3019; 71-3030, March 1972); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968). Under the authorities cited, the District Court was unquestionably correct in dismissing plaintiff's action as to the City."

argument. The opinion is per curiam and in two short paragraphs:

> "The plaintiff filed an action against the City of Alameda alleging that he had been deprived of rights in violation of 42 U.S.C. §§ 1981 and 1986. The complaint was dismissed on motion upon the ground that the city is not a 'person' and cannot be sued under the Civil Rights Act. [sic] An amended pleading based upon the same statute against the same defendant was again dismissed and this appeal taken.
>
> It is abundantly clear that a municipal corporation is not a 'person' subject to suit under 42 U.S.C. 1983. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969). The district court was unquestionably correct and we affirm." (Footnote omitted).

We believe the first sentence of the opinion to be factually incorrect because we cannot find in the amended complaint any claim of a violation of § 1986. The second paragraph of the opinion, which contains the holding, makes what we believe a fundamental error with respect to § 1981, i.e. the assumption that liability is imposed by § 1981 only upon "persons". Whereas § 1983 does use that term defining who is liable, § 1981 does not use the term nor does it limit in any way who may be liable as a defendant for a violation.

It is unfortunate but understandable that the *Arunga* opinion assumes that various of the Civil Rights Acts (42 U.S.C. § 1981 through § 1988) and particularly §§ 1981, 1982 and 1983, should be construed and applied according to common rules and principles. This approach may well result from the fact that all of the substantive Civil Rights Acts were

codified together in 1874 in the Revised Statutes.[7] But it ignores certain other important historical facts: (1) that §§ 1981 and 1982, which are companion sections, were originally enacted in 1866, whereas § 1983 did not become law until 1871[8] and (2) that §§ 1981 and 1982 are derived from, and based upon, the 13th Amendment, whereas § 1983 was enacted to implement the 14th Amendment.[9]

As the Supreme Court points out in *Monroe*, the legislative history of § 1983 and the use of the term "person" therein, preclude its application to political subdivisions. But a careful examination of the legislative history of §§ 1981 and 1982 establishes, we think, with equal clarity, that political subdivisions were intended to be included within their ambit. The legislative history of § 1981 to which we refer has been extensively collated by at least three other district courts. *Robinson v. Conlisk*, 385 F.Supp. 529 (N.D.Ill. 1974); *Maybanks v. Ingraham*, 378 F.Supp. 913 (E.D.Pa. 1974); *League of United Latin American Citizens v. City of Santa Ana, supra*. It serves no useful purpose for us to duplicate or reproduce those discussions; we incorporate them by reference.

The Supreme Court, post-*Arunga*, has said in analyzing § 1982:

---

[7]For further discussion of the history of the codification, see *Runyon v. McCrary*, 427 U.S. 160, 168 n. 8, 96 S.Ct. 2586, 2593 n. 8, 49 L.Ed.2d 415 (1976).

[8]With respect to the other parts of what has been called "The Civil Rights Acts", §§ 1987 and 1988 enacted along with §§ 1981 and 1982, in 1866, and § 1986 was adopted with § 1983, as part of the Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13. A part of § 1985 was originally enacted in 1861, but the present full § 1985 was also adopted in 1871. Section 1984, which grants no substantive rights, was not enacted until 1875. Act of March 1, 1875, ch. 114, § 5, 18 Stat. 337.

[9]In addition to §§ 1981 and 1982, §§ 1987 and 1988 are also based upon the 13th Amendment while §§ 1985 and 1986, along with § 1983 were enacted pursuant to the 14th Amendment.

> "[L]ike the Amendment upon which it is based, § 1982 is not a 'mere prohibition of State laws establishing and upholding racial discrimination in the sale and rental of property, but rather [is], an 'absolute' bar to all discrimination, private as well as public, federal as well as state." *District of Columbia v. Carter*, 409 U.S. 418, 422, 93 S.Ct. 602, 605, 34 L.Ed.2d 613 (1974).

We read this language as an affirmation that all sources of discrimination, including governmental entities, are reachable under § 1982.

Because they are companion sections, having a common derivation and legislative history, it would appear that what applies to § 1982 applies with equal force to § 1981.[10]

Unfortunately, the Supreme Court has not yet decided the question of whether political subidivisions are suable under § 1981. One circuit and a number of district courts have held, as we hold, that they are.[11] Two district courts outside our Circuit, relying on *Arunga*, have held that they are not.[12] The lack of a definitive Supreme Court decision and the paucity of other authority since *Arunga* probably results from the passage of the 1972 amendments to Title VII of the Civil Rights Act of 1964, making political subdivisions amenable to suit under Title VII for discrimination

---

[10] *Jones v. Alfred Mayer Co.*, 392 U.S. 409, 422 n. 78, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Bowers v. Campbell*, 505 F.2d 1155, 1157-58 (9th Cir. 1974); *Macklin v. Spector Freight Systems, Inc.*, 156 U.S.App.D.C. 69, 478 F.2d 979, 993-94 (1973).

[11] *Campbell v. Gadsden County District School Board, supra* note 5; *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D.Cal. 1976); *Robinson v. Conlisk*, 385 F.Supp. 529 (N.D.Ill. 1974); *Hines v. D'Artois*, 383 F.Supp. 184 (W.D. La. 1974); *Maybanks v. Ingraham* 378 F.Supp. 913 (E.D.Pa. 1974).

[12] *Redding v. Medica*, 402 F.Supp. 1260 W.D.Pa. 1975) *Black Brothers v. City of Richmond*, 386 F.Supp. 147 (E.D.Va. 1974).

in employment.[13] The confusion caused by *Arunga* leads us to the fervent hope that our Circuit will shortly have occasion to take a second look at the legal question decided in it.

(B) *The 14th Amendment Claim*

A claim cognizable in this court is stated against the County under the 14th Amendment. Relatively recent authority makes clear that political subdivisions of states are answerable in the district courts for direct constitutional violations in a complaint seeking injunctive relief, damages or both, despite the absence of any statute specifically creating the cause of action.

In 1971 the Supreme Court held in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) that, without an enabling statute, liability in damages existed for direct constitutional violations with district court jurisdiction being found in § 1331(a). The defendants in *Bivens* were federal FBI agents and the direct constitutional violation alleged was a 4th Amendment violation. No extension of *Bivens* to agents of state or local government was needed since 42 U.S.C. § 1983 provided a specific remedy in the federal courts against them, and 28 U.S.C. § 1343(3) provided clear federal jurisdiction.

Utilizing the Bivens rationale, the Supreme Court later *clearly* implied that an action may be brought in the federal courts against political subdivisions of states for direct constitutional violations including 14th Amendment violations.

---

[13]Plaintiffs in our case cannot resort to Title VII because discrimination based on alienage is not included within the types of discrimination prohibited by it. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 (1974).

City of Kenosha v. Bruno, supra.[14] After twice declining to decide that question[15] our own Circuit has now specifically decided it. Relying on *Kenosha*, the Circuit held that political subdivisions of states may be sued for both damages and equitable relief for constitutional violations, with jurisdiction being provided by § 1331(a). *Gray v. Union County Intermediate Education Department*, 520 F.2d 803, 805 (9th Cir. 1975).[16] *Gray* involved a school district but the court characterized a school district as a "political subdivision" of a state. *Id.*

(C) *Amount In Controversy*

Having determined that a claim "arising under the Constitution" and one also arising "under the laws" of the United States are presented, we have jurisdiction of that

---

[14]Plaintiffs were holders of retail store and tavern liquor licenses whose renewal applications had been denied by the two defendant cities under procedures set up by state statute. Alleging that their renewal applications were unconstitutionally denied, they sought injunctive relief including a declaration that the statutes involved were unconstitutional. A three-judge district court held that a claim under § 1983 was properly pled against the cities because only equitable relief was sought, and found jurisdiction under § 1343(3). The Supreme Court reversed the § 1983 holding but remanded the case rather than ordering judgment for the defendant cities. The remand order assumed that jurisdiction might well exist under § 1331(a) if the requisite amount in controversy was shown to exist. Two Justices, in a concurring opinion, viewed the remand as a holding by the Court, for the first time, that jurisdiction existed under § 1331(a) for actions against a city charging direct constitutional violations. See concurring Opinion of Brennan, J., 412 U.S. at 516, 93 S.Ct. 2222.

[15]*Aldinger v. Howard*, 513 F.2d 1257 (9th Cir. 1975), *aff'd.*, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976); *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974).

[16]The Third and Fifth Circuits and other district courts are in accord that direct constitutional causes of action may be maintained against political subdivisions of states. *Reeves v. City of Jackson*, 532 F.2d 491 (5th Cir. 1976); *Skehan v. Board of Trustees*, 501 F.2d 31 (3rd Cir. 1974); *Redding v. Medica*, 402 F.Supp. 1260 (W.D.Pa. 1975); *Williams v. Brown*, 398 F.Supp. 155 (N.D.Ill. 1975); *Maybanks v. Ingraham, supra*, note 11; *Dahl v. Palo Alto*, 372 F.Supp. 647 (N.D.Cal. 1974). But *Cf. Brault v. Town of Milton*, 527 F.2d 730 (2d Cir. 1975) (*en banc*).

claim under § 1331(a) if the "amount in controversy exceeds $10,000."

The amount in controversy must be found to exist under § 1331(a) as to each plaintiff. *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). If attention is focused solely on the amount of awardable money damages, one might entertain a substantial doubt about the existence of the requisite $10,000 jurisdictional requirement in this case. No plaintiff pleads money damages in any specific amount. One plaintiff seeks no money damages at all. The other two, who were employed in other positions during the period in question, seek damages consisting of "back pay and seniority benefits". If each of those plaintiffs must offset, by way of mitigation, the wages and benefits earned at other work, it is quite clear that neither could be awarded damages which exceed $10,000.[17]

But it is not proper, in deciding the amount in controversy, to focus solely on the money damage aspect of this case. Equitable relief, by way of injunction, is also sought here. In *Glenwood Light & Water Company v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 36 S.Ct. 30, 60 L.Ed. 174 (1915), the Court said of injunctive actions:

> ". . . The jurisdictional amount is to be tested by the value of the object to be gained by the complainant." 239 U.S. at 125, 36 S.Ct. at 32.

And of civil rights actions under 28 U.S.C. § 1331, it has been said that the amount in controversy is the value of the

---

[17]The difference in pay between the trainee position accepted by Chavez-Salido and the position he now seeks is $333 per month and the period of denial is less than 18 months. As to Ybarra, the evidence indicates that he earned an average of about $900 per month during the denial period in the job at the Housing Authority. For Ybarra, the denial period does not exceed 14 months.

right to be protected. 1 Moore's Federal Practice § 0.96[3.-1] at 939.[18]

Where a case involves denial of employment or dismissal from employment, courts have held that the amount in controversy may be met by considering the value of the job in question, i.e. the amount of money which plaintiff would earn in the job for the indefinite future of for the rest of his work expectancy. *Friedman v. International Association of Machinists*, 95 U.S. App.D.C. 128, 220 F.2d 808, 810 (1955); *Hiss v. Hampton*, 338 F.Supp. 1141, 1146 (D.D.C. 1972): *White v. Bloomberg*, 345 F.Supp. 133, 141 (D.Md. 1972). We adopt that rule and under it, the case of each plaintiff amply meets the $10,000 amount in controversy requirement. The value of the position of Deputy Probation Officer II, which is the "object to be gained" by the complaint, exceeds $10,000.

Since we have found that a claim is stated against the County under both the 14th Amendment and § 1981 which

---

[18]We are mindful that some courts have in effect ignored the $10,000 jurisdiction requisite in cases involving claims of violation of constitutional rights. These courts seem to hold that constitutional rights are so precious that, by definition, they are in every case worth more than $10,000. *See e.g. Spock v. David*, 469 F.2d 1047 (3d Cir. 1972)., *reargued*, 502 F.2d 953 (3d Cir. 1974), *reversed on other grounds sub nom. Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); *CCCO-Western Region v. Fellows*, 359 F.Supp. 644 (N.D.Cal. 1972); *West End Neighborhood Corp. v. Stans*, 312 F.Supp. 1066 (D.D.C. 1970). This view apparently stems from the separate opinion of Mr. Justice Stone in *Hague v. C.I.O.*, 307 U.S. 496, 529, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). There is substantial contra authority. *See e.g. Goldsmith v. Sutherland*, 426 F.2d 1395 (6th Cir.) *cert. denied*, 400 U.S. 960, 91 S.Ct. 353, 27 L.Ed.2d 270 (1970); *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001, 85 S.Ct. 718, 13 L.Ed.2d 702 (1965). In the absence of any decision on the point from out Circuit we decline to follow the cases first-above cited which find the amount in controversy invariably present because constitutional rights are not capable of valuation in monetary terms. For a full discussion of the entire problem, see the footnote in *Gomez v. Wilson*, 155 U.S.App.D.C. 242, 477 F.2d 411, 420 n.56 (1973).

is cognizable in a district court, and that the jurisdictional amount in controversy exists, we find jurisdiction against the County is granted to us under § 1331(a).[19]

III.

THE MERITS

In three recent cases the Supreme Court has invalidated state statutes or regulations requiring citizenship as a condition of obtaining public employment or licenses.[20] In *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973) the Court struck down a provision of the New York Civil Service Law which required citizenship for appointment to any position in the state's classified civil service. There were four named plaintiffs, all permanent legal resident aliens, who sued for themselves and for a class. Two of the plaintiffs were clerk-typists, one was a human resources technician, and the fourth and administrative assistant.

The Court's opinion emphasized the overbroad and indiscriminate nature of the statute, i.e. that the class of positions for which citizenship was required "reached

---

[19]We also note, *sua sponte*, that jurisdiction of the claim against the County may also exist under another jurisdictional statute, 28 U.S.C. § 1343(4).

Section 1343(4) is a grant to the district courts of original jurisdiction in any civil action "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." Section 1343(4) is not broad enough to cover a charge of direct violation of the 14th Amendment since the section is limited to civil actions arising "under any Act of Congress". But since we hold that the County is amenable to suit in a § 1981 action, § 1343(4) would give us jurisdiction and without respect to the amount in controversy. *Bowers v. Campbell*, 505 F.2d 1155 (9th Cir. 1974), *Campbell v. Gadsden County District School Board*, 534 F.2d 650 (5th Cir. 1976).

[20]See also the summary affirmance by the Supreme Court in *Lefkowitz v. C.D.R. Enterprises, Ltd.*, ... U.S. .... , 97 S.Ct. 721, 50 L.Ed.2d 742 (1977), *aff'g C.D.R. Enterprises, Ltd. v. Board of Education of City of New York*, 412 F.Supp. 1164 (E.D.N.Y. 1976) (three-judge).

. . . positions in nearly the full range of work tasks, . . . all the way from the menial to the policy making." *Id.* at 640, 93 S.Ct. at 2846. The opinion noted that citizenship was not required for the unclassified civil service within which many of the higher policy making decisions were included. The Court categorically rejected the claim that a state can confine public jobs, paid for by public resources, to citizens of the country. While observing that each state had the power to prescribe the qualifications of voters, elective office holders and holders of "important nonelective executive, legislative and judicial positions . . . [and] officers who participated directly in the formulation, execution, or review of broad public policy . . .," the Court emphasized that such a statute must be "narrowly confined". *Id.* at 647, 93 S.Ct. at 2850. In a provocative and much discussed passage the Court said:

> "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community,.'" *Dunn v. Blumstein*, 405 U.S. 330, 344 [92 S.Ct. 995, 1004, 31 L.Ed.2d 274] (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.* at 642-43, 93 S.Ct. at 2848.

In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), decided the same day as *Sugarman*, struck down a rule of the Connecticut court system requiring citizenship as a prerequisite for admission to the bar. Plaintiff was a long-time resident of the United States who was married to an American citizen and thus apparently entitled to remain here indefinitely. The Court rejected the argument that the

special role of the lawyer within the governmental system justified excluding aliens from the practice of law. Although a Connecticut lawyer is denominated as a "commissioner" of the Superior Court with the right to sign writs and subpoenas, acknowledge deeds, administer oaths, take depositions and command the assistance of sheriffs and constables in the exercise of his authority, the Court stressed that these duties did not involve matters of such high policy or responsibility as would authorize a state to entrust them only to citizens. As in *Sugarman*, the Court stressed the duties imposed on resident aliens, which include the same obligation to pay taxes, and serve in the Armed Forces as are imposed on citizens. It observed that while lawyers (and other state employees) are required to take an oath to support the Federal and State Constitutions, such oath is customarily administered to resident aliens inducted into the Armed Forces and is thus deemed to be consistent with citizenship in a foreign country. The Court concluded that Connecticut had failed to establish any compelling state interest in confining law practice to citizens.

In *Examining Board of Engineers v. De Otero*, 426 U.S. 572, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976), the Court struck down a statute of Puerto Rico restricting the issuance of licenses for the practice of civil engineering in the private sector, to U.S. Citizens. Puerto Rico was held to be "territory" within the ambit of federal civil rights and jurisdictional statutes. Among the justifications advanced by Puerto Rico for requiring citizenship was the claim that citizen engineers are more likely to be present in the community and to be financially more accountable than non-citizens, a matter of significance since engineers may be liable for malpractice for ten years under local law. Another justification offered was that by confining the privilege of practicing engineering to citizens, Puerto Rico could prevent

the uncontrolled influx of Spanish-speaking aliens into this professional field. A third justification offered was to raise the prevailing low standard of living. The Court held that these justifications, like those of New York in *Sugarman* and Connecticut in *Griffiths*, were inadequate.[21]

From these opinions of the Supreme Court we can abstract the rules of law which we must apply in judging the California statute in question here. First, the equal protection guarantee as embodied in the 14th Amendment extends to permanent resident aliens. Second, a state statute or regulation classifying citizens and noncitizens and attaching disabilities to noncitizenship, involves a 'suspect classification''. Third, any ''suspect classification'' is subject to strict judicial scrutiny; for the statute to survive the state must establish (1) that the suspect classification [alienage] serves a compelling state interest, (2) that the classification is reasonably necessary to promote that compelling state interest, and (3) that the statute be narrowly and precisely drawn so as to avoid a classification that ''sweeps too broadly''.

We now proceed to measure the California statute, which is the subject of the instant case, against these criteria.

---

[21]In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), the Supreme Court held unconstitutional a Civil Service Commission regulation requiring citizenship for practically all federal civil service positions. The holding that the Civil Service Commission was without power to exclude noncitizens from such a wide range of positions is a relatively narrow one. The Court said that such power, if it exists at all, belongs only to Congress and held that the exercise of such power by the Commission violated due process. The opinion contains interesting language which hints that Congressional, or even Presidential, action requiring citizenship as a pre-requisite for federal government employment and justified as an inducement for immigrants to become citizens, might be valid. This inducement to citizenship justification has not been dealt with in any prior opinion of the Supreme Court or in any prior judicial opinion cited to us. It was not advanced in the instant case.

In relevant part, California Government Code § 103(a) provides:

> "In any instance in which . . . members of a class of public officers or employees are . . . *declared by law to be peace officers or to have the powers of peace officers,* each member of such class must meet at least the following minimum standards:
>
> (a) Be a *citizen* of the United States."
>
> (Emphasis added)

California Penal Code § 830 and various subsections thereunder provide a very long list of occupations and positions classified as peace officers or having the powers thereof. Deputy probation officers are included.[22] contains

---

[22] *Under § 830.1*
sheriff
undersheriff
deputy sheriff
policeman
marshal
deputy marshal
constable
deputy constable
Under § 830.2
highway patrolmen
members of the California State Police Division
members of the California National Guard when called into active service by the Governor
members of the University of California police department
members of a state college police department
Under § 830.3
officers and special agents of the Department of Justice, Bureau of Criminal Identification and Investigation
officers and agents of the Bureau of Narcotic Enforcement
investigators in the office of a district attorney
the Director and enforcement officers of the Department of Alcoholic Beverage Control
officers and investigators of the Division of Investigation of the Department of Consumer Affairs
investigators of the Board of Medical Quality Assurance
members and deputies of the Wildlife Protection Branch, Department of Fish and Game
county fish and game wardens

the entire list which ranges all the way from important law

State Forester and employees of the Division of Forestry
voluntary fire wardens
officers and manager of compliance services of the Department of Motor Vehicles
investigators of the Department of Motor Vehicles
Secretary and Chief Investigator of the California Horse Racing Board
racetrack investigators of the California Horse Racing Board
police officers of a regional park district
state fire marshal, and deputy fire marshals members of an arson-investigating unit of a fire department.
members of a fire department of a local agency
inspectors of the Bureau of Food and Drug
park rangers
members of a community college police department
investigators of the Division of Labor Law Enforcement

Under § 830.4

security officers of the California State Police Division
Sargeant at Arms of each house of the Legislature
Baliffs of the Supreme Court and the courts of appeal
guards and messengers of the State Treasurer's Office
director and employees of the Department of Navigation and Ocean Development
the administrator of a state hospital and police officers designated by him
railroad or steamboat company policemen commissioned by the Governor
sextons and superintendents of cemeteries
other cemetery personnel designated by a cemetery authority (See Health and Safety Code § 8325)
harbor policemen
special officers of the Department of Airports of the City of Los Angeles
the chief of toll services of the Department of Transportation and his captains, lieutenants and sergeants employed on vehicular crossings
members of a security patrol of a school district
authorized federal employees engaged in enforcing applicable state or local laws on federal property
Los Angeles County security guards
airport policemen designated by the Monterey Peninsula Airport District
airport security officers at airports operated by San Francisco, Orange or San Joaquin Counties
housing authority patrol officers employed by the housing authorities of Los Angeles or Contra Costa Counties

Under § 830.5

parole officers of the Department of Corrections
placement or parole officers of the Youth Authority
probation officers
deputy probation officers

(footnote continued on following page)

enforcement positions to positions having apparently insignificant and menial duties. Included in the latter group are sextons and superintendents of a cemetery authority and other cemetery employees, inspectors of the Bureau of Furniture and Bedding Inspection, sealers of the Department of Weights and Measures and messengers of the State Treasurer's Office.

The only justification advanced by the defendants in this case as a compelling state interest is the one described in *Sugarman*, the State's power to define its "political community". We read the references in *Sugarman* to the "political community" for which the State may prescribe citizenship as a requisite of office, as being confined to high policy making officers. When confronted with this reading, defendants argue that the California statute in issue is ap-

---

warden, superintendent, supervisor or guards employed by the Department of Corrections any employee having custody of a ward in an institution of the Youth Authority
transportation officers of the Youth Authority
Under § 830.5a
agents of the law liaison unit of the Department of Corrections
Under § 830.6
persons deputized or appointed as a reserve or auxiliary sheriff, deputy sheriff or city policeman
In addition to the above, the following have the powers of peace officers:
Any person summoned to the aid of any uniformed police officer as in a posse comitatus (Penal Code § 830.6[b])
the director, officers and employees of the Division of Aeronautics (Pub. Util. Code § 21252) any person vested with the power of enforcing any provisions of the Agriculture Code (Agric. Code §7)
county fire wardens and assistant and deputy fire wardens (Government Code § 24008)
inspectors of the Board of Dental Examiners (Business and Professions Code § 1704)
inspectors of the Bureau of Furniture and Bedding Inspection (Business and Professions Code § 19206)
inspectors of the Bureau of Livestock Identification (Agric. Code § 20432)
mental health counselors (Welfare and Institutions Code § 6778)
officers and employees of the state park system (Public Resources Code § 5008)
sealers of the Department of Weights and Measures (Business and Professions Code § 12013)

plicable to only a "few" positions which are either "high level" or require "demanding discretional decisions in their everyday execution." We cannot agree with the defendants. It is obvious from the long list of covered positions contained in the footnote that the statute is much broader than they claim and covers many positions with much less responsible duties than they describe. The claimed "political community" justification in this case, therefore, does not support this statute any more than it supported the requirement of citizenship for the classified civil service in New York State in *Sugarman*.

But even if we assume *arguendo* that the California statute serves a compelling state interest and employs a classification reasonably necessary to promote that compelling state interest, we would have to strike it down on the ground that it is not narrowly and precisely drawn and that it "sweeps too broadly."[23]

Although the concept was not discussed in the briefs, at the argument of the case, the court and counsel discussed whether the validity of § 1031(a) should be considered as applied, i.e. as limited to the position of deputy probation officer which is the position sought by all three plaintiffs.

The prior decisions of the Supreme Court dealing with alienage, which we have discussed above, would appear to rule out consideration of the validity of this statute as applied. Those decisions stress that the scrutiny which should be afforded to such a statute must include an examination

---

[23]In various constitutional and statutory provisions, California requires citizenship as a qualification for holding statewide elective office including Governor and Lieutenant Governor and for holding certain top executive positions in state government. *See e.g.* Cal.Const. art. 5, §§ 2 and 9 and Government Code §§ 241, 1001 and 1020. We express no view as to the validity of those provisions; they are not in issue here.

of whether it is too broad in its sweep, overinclusive. That is why we, as the Court did in *Sugarman*, have examined all of the types of positions for which citizenship is required. But we are also aware that in other contexts, the Supreme Court has resorted to the "as applied" technique for the announced purpose of avoiding advisory opinions and unnecessary constitutional adjudication, especially where the outer parameters of the state statute are cloudy and unadjudicated. *See, e.g., United States v. Raines*, 362 U.S. 17, 20-22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960). So, out of an abundance of caution, we proceed to examine § 1031(a) as applied.

The evidence before us contains no description of the duties performed by a deputy probation officer in California. However, counsel stipulated at the argument that we may take judicial notice of those duties based on our experience as judges. It is fortunate that all three members of this court had extensive experience as state court judges in California before appointment to the federal bench.

Deputy probation officers in California perform a wide range of duties. They include preparation of presentence investigations and recommendations as to sentence, supervision of probationers (including efforts to ameliorate their employment, health and family problems) and investigation of probation violations. Also included are various duties in connection with juveniles and juvenile courts among which are the filing of juvenile court petitions charging both delinquency and illegal acts, presence at juvenile court hearings in an advisory capacity, placement of minors declared to be wards of the juvenile court and supervising custodial personnel in juvenile incarceration institutions. Important as those duties are, we cannot characterize a deputy probation officer as an employee who participates "directly in the formulation, execution, or review of broad public policy

. . . ." *Sugarman, supra,* 413 U.S. at 647, 93 S.Ct. at 2850. Since a compelling state interest appears only when the requirement of citizenship is confined to positions of that type, the statute must be condemned even as applied. As in *Griffiths,* we would find that the duties of a deputy probation officer "hardly involve matters of state policy or acts as such unique responsibility as to entrust them only to citizens." 413 U.S. at 724, 93 S.Ct. at 2856. A similar approach has recently been taken in a well-reasoned opinion of a three-judge district court striking down a New York statute requiring public school teachers to be citizens. *Norwick v. Nyquist,* 417 F.Supp. 913 (S.D.N.Y. 1976). If neither lawyers nor teachers can be required to be citizens, it would seem to us an *a fortiori* proposition that citizenship cannot be required for deputy probation officers.[24]

Having held that § 1031(a) violates the equal protection clause of the 14th Amendment, it follows that the denial of employment to the plaintiffs pursuant to § 1031(a) involves a violation of 42 U.S.C. § 1981 by the County and a violation of 42 U.S.C. § 1983 by the individual defendants. The County has denied to these plaintiffs the "same right . . . to make and enforce contracts . . ." as are enjoyed by citizens (§ 1981). The individual defendants have denied these plaintiffs "under color of [a State] statute . . . [the] rights, privileges, or immunities secured by the Constitution . . . ." (§ 1983).

Our decision herein should come as no shock or surprise either to the defendants in the instant case or to other

---

[24]Our opinion, in striking down § 1031(a) on its face and as applied, should not be read as holding that California could not constitutionally enact a citizenship requirement for a narrowly confined class of the most important peace officers. We do not decide, for example, whether county sheriffs or city police chiefs are within the state's "political community" or whether a citizenship requirement for them would be reasonably necessary to promote such a compelling state interest.

California officials. Since no California court has passed upon the constitutionality of Government Code § 1301(a) up to this time the officials of Los Angeles County have apparently felt constrained to observe its requirements. But the California Attorney General seven years ago declared it to be unconstitutional[25] His opinion appears correctly to have anticipated the Supreme Court's *Sugarman* decision. Additionally, the California Supreme Court in 1969 struck down a statute prohibiting the employment of aliens on public works[26] and, even before the Supreme Court spoke in *Griffiths*, invalidated a citizenship requirement for the practice of law.[27] And the California legislature, in 1970, repealed a blanket statute which required that every employee of the state and every county or city therein must be a citizen.[28] So the direction of the tide has been clear. One need not have qualified as a soothsayer to have predicted our present holding.[29]

Since we have declared § 1031(a) to be unconstitutional because it discriminates illegally on the basis of alienage the claims of plaintiffs involving the right to travel and intrusion on Congress' immigration powers are rendered moot. We decline to discuss or decide those claims.

---

[25]53 Cal.Atty.Gen.Opin. 63 (1970).

[26]*Purdy & Fitzpatrick v. State*, 71 Cal.2d 566, 79 Cal.Rptr. 77, 456 P.2d 645 (1969) (invalidating Labor Code § 1850).

[27]*Raffaelli v. Committee of Bar Examiners*, 7 Cal.3d 288, 101 Cal.Rptr. 896, 496 P.2d 1264 (1972).

[28]*See* Historical Note preceding California labor Code § 1960.

[29]It would have been preferable, in the interests of harmonious federal-state relationships, for plaintiffs to have sought relief in the state courts instead of mounting their initial challenge in the federal courts. In the lights of the above-mentioned California decisions and Attorney General's opinion, it appears that a 14th Amendment challenge in the state courts might well have succeeded. However, in our view, plaintiffs' bypass of state court remedies, for whatever reason, does not warrant abstention on our part.

IV.
RELIEF

If the statute is declared unconstitutional, defendants do not appear to dispute the specific relief sought by the various plaintiffs except as to damages and attorneys fees.

All three plaintiffs seek a declaratory judgment that Government Code § 1031(a) is unconstitutional and an injunction preventing its enforcement against them. Such declaratory judgment and injunction shall issue. The judgment will run against all defendants and will bind the successors in office of the individual defendants.

As to Plaintiff Chavez-Salido, the judgment will contain an order requiring his immediate appointment to the position of Deputy Probation Officer II—Spanish Speaking, with seniority rights retroactive to September, 1975. As to Plaintiff Ybarra, the judgment will contain an order requiring his immediate appointment to the position of Deputy Probation Officer I with seniority benefits retroactive to January, 1976. The judgment will further order his restoration to the eligibility list for Deputy Probation Officer II—Spanish-Speaking, retroactive to November, 1975.

As to Plaintiff Bohorquez, the judgment will contain an order directing defendants to invalidate the results of the examination for Deputy Probation Officer II—Spanish Speaking, which he took in May, 1975 and requiring them immediately to give him another test. Should Bohorquez pass the new test, the judgment will order him restored to the eligibility list for that position retroactive to May, 1975.

We pass now to the issue of damages. Plaintiffs have formally renounced any intention to seek a damage award

against any individual defendant[30] Thus the court is not required to consider certain difficult questions of governmental employee immunity which would arise if money damages were sought against the individuals.

However, plaintiffs do press their claim for money damages against the County. It is settled that a county is not clothed with the immunity from money damage awards enjoyed by a state under the 11th Amendment, unless the county's damage obligation would be paid out of the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The County makes no showing that if damages are awarded against it, they must be paid from state funds. Thus, the County is not immune. But whether damages should be awarded against the County under the facts of this case is a matter that we, as a three-judge court, decline to decide at this point.

The parties have neither briefed nor argued for us a number of questions related to a possible damage award against the County. These include (1) whether damages are compelled or discretionary, (2) if discretionary, what factors should be considered in exercising that discretion, and (3) the measure of damages, including whether there should be an offset by way of mitigation for sums earned in other employment. We therefore refer the matter of damages to the single judge to whom the case was originally assigned for further consideration by him. He will have authority to enter any further judgment on the issue which he deems appropriate. One difficult question to be considered by the single judge is whether damages should be awarded at all where the act complained of as being illegal was the County's observance of the clear and unequivocal mandate

---

[30]See the stipulation of counsel filed Jan. 13, 1976 which renounces both damages and attorneys fees as against the individual defendants.

of a state statute which had not been declared unconstitutional by any court.

The plaintiffs also seek attorneys fees, but only against the County. At the time of the filing of this action and its trial, it appeared that attorneys fees were not awardable in civil rights damage actions except where specific authority to award them was contained in the applicable statute. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). And, there was no specific statutory authority for fees which applied to our case. However, after the argument, a new statute on the subject became effective which authorizes disretionary awards of attorneys fees to the prevailing party in certain civil rights matters. The Civil Rights Attorney's Fees Awards Act of 1976, Pub.L.No. 94-559, 90 Stat. 2641. The new Act is not expressly applicable to cases pending on the date of its enactment, but a recent action of the Supreme Court indicates that it may well be,[31] and a recent district court decision so holds.[32]

It is therefore appropriate for us also to refer the attorneys fees question to the single judge to whom the case was originally assigned, with authority to decide it.

This opinion will constitute this court's findings of fact and conclusions of law as to the issues herein decided and the partial judgment herein ordered. Counsel for plaintiffs will prepare and submit a partial judgment within ten days. Defense counsel, if the proposed partial judgment is not approved by him as to form, will have ten days further in which to file written objections which will not change the

---

[31]See the summary disposition in *Stanton v. Bond*, ... U.S. ...., 97 S.Ct. 479, 50 L.Ed.2d 581 (1976).

[32]*Wade v. Mississippi Cooperative Extension Service*, 424 F.Supp. 1242 (N.D. 1976).

result. The single district judge to whom the case was assigned, after deciding the unresolved questions referred to him herein, may sign and file a final judgment in the case.

ADDENDUM TO OPINION

Following the filing of our Opinion on February 3, 1977, we became aware for the first time of an *en banc* decision of our Circuit in *Sethy v. Alameda Co. Water District*, 545 F.2d 1157 (9th Cir. 1976). It was published in Federal Reporter (2d Series) after our Opinion was filed. In *Sethy*, the Circuit appears to overrule *Arunga v. Weldon*, 469 F.2d 675 (9th Cir. 1972) and explicitly holds that a municipal subdivision may be sued under § 1981. Our Opinion is in accord with the *Sethy* decision and *Sethy* in no way affects either the rationale or the result we reached herein.

Partial Judgment.

United States District Court, Central District of California.

Jose Chavez-Salido, et al., Plaintiffs, v. Clarence E. Cabell, etc., et al., Defendants. No. CV 76-0541-IH.

This cause having been tried and argued before this Court on August 20, 1976, plaintiffs appearing by and through counsel Michele Washington and Richard A. Paez and defendants appearing by and through counsel John H. Larson, County Counsel, and Philip H. Hickok, Deputy County Counsel, the matter having been submitted for decision, and the Court having made findings of fact and conclusions of law in its Opinion of February 3, 1977.

IT IS HEREBY ORDERED, ADJUDGED AND DECLARED:

1. Partial Judgment shall be entered on behalf of plaintiffs and against defendants; with plaintiffs Chavez-Salido, Bohorquez and Ybarra having relief as follows:

(a) It is declared that California Government Code §1031(a), on its face, and as applied is violative of the Fourteenth Amendment to the United States Constitution in that said statute denies plaintiffs equal protection of the laws and is therefore void and unenforceable.

(b) It is further declared that the actions of defendant County of Los Angeles by and through its employees in denying plaintiffs employment solely because of their alien status was and is violative of 42 U.S.C. §1981.

(c) It is further declared that the actions of the individual defendants and their successors in office in denying plaintiffs employment solely because of their alien status was and is violative of 42 U.S.C. §1983.

(d) Defendant County of Los Angeles and the individual defendants and their successors in office, agents, assigns, employees, and all of the persons under their supervision are hereby permanently enjoined from enforcing and/or applying California Government Code §1031(a) against plaintiffs.

(e) It is further ordered that immediately upon entry of this judgment, defendant County of Los Angeles and the individual defendants, shall appoint plaintiff Chavez-Salido to the position of Deputy Probation Officer II—Spanish-Speaking with all seniority benefits retroactive to September, 1975.

(f) It is further ordered that immediately upon entry of this judgment, defendant County of Los Angeles and the individual defendants, shall appoint plaintiff Pedro Luis Ybarra to the position of Deputy Probation Officer I with seniority benefits retroactive to January, 1976. It is further ordered that plaintiff Pedro Luis Ybarra shall be restored to the eligibility list for Deputy Probation Officer II—Spanish-Speaking retroactive to November, 1975.

(g) It is further ordered that immediately upon entry of this judgment, defendant County of Los Angeles and the individual defendants shall invalidate the results of the examination for Deputy Probation Officer II—Spanish-Speaking, which plaintiff Ricardo Bohorquez took in May, 1975 and immediately give plaintiff Bohorquez another test. Should plaintiff Bohorquez pass the new test, defendant County of Los Angeles and the individual defendants shall restore his name to the eligibility list for the position of Deputy Probation Officer II—Spanish-Speaking, retroactive to May, 1975.

2. The County of Los Angeles, and the individual defendants and their successors in office, agents, assigns, employees and all persons under their supervision, shall, no

later than 30 days from the date of entry of this partial judgment, submit to the Court, with a copy to counsel for plaintiffs, report detailing the actions taken in compliance with the Opinion and Order of this Court.

3. The request for damages in the form of sick pay by plaintiffs Joe Chavez-Salido and Pedro Louis Ybarra is referred to District Court Judge Irving Hill. Judge Hill shall have the authority to enter any further orders and judgment on the issue of damages as he deems just and proper in accordance with the Court's Opinion.

4. The issue of whether attorneys' fees may be awarded against the County of Los Angeles is also referred to District Court Judge Hill. He shall have authority to determine whether plaintiffs are entitled to attorneys' fees, and if so, the amount of any such award.

5. Upon his determination of the remaining issues referred to in paragraphs 3 and 4 hereof, Judge Hill may himself sign and enter a final judgment in this case.

6. The District Court Judge to whom this cause was originally assigned shall retain jurisdiction over this matter until such time as defendants are fully complied with paragraph 1 of this judgment and until the issues specified in paragraphs ... and 4 of this judgment have been finally resolved.

7. Plaintiffs shall be awarded their costs of suit in the amount of _____, except that an award of attorneys' fees, if any, shall be made pursuant to paragraph 4 of this judgment.

8. There is no just reason to delay entry of this partial judgment against the defendants and it is hereby directed that it be so entered.

IT IS SO ORDERED.

DATED: February 23, 1977.

/s/ Stanley N. Barnes
STANLEY N. BARNES
Senior Circuit Judge

/s/ Jessie W. Curtis
JESSIE W. CURTIS
Senior District Judge

/s/ Irving Hill
IRVING HILL
District Judge

Civil Minutes — General.

United States District Court, Central District of California.

Case No.: CV 76-541-IH.

Date: 7/6/78.

Title: Jose Chavez-Salido, et al v. Clarence E. Cabell, et al.

DOCKET ENTRY Ord mandate from Supreme Crt fld & spread. Pltf's req for fur dis on issue of duties, etc. denied. Pltf's are relieved from prior agreement abjuring liability against deft County under Sec. 1983. Crt ords all prcdgs stayed pending decision by Supreme Crt in *Norwick v. Nyquist*. Deft's oral mtn to dismiss comp denied. Cnsl agree m.o. will suffice. (IH)

Present: Hon. Irving Hill, Judge; C. R. Kimzey, Deputy Clerk; Don Cram, Court Reporter.

Attorneys Present for Plaintiffs: Richard A. Paez.

Attorneys Present for Defendants: Philip H. Hickoc, Deputy County Counsel.

Proceedings: (Status Conference in chambers)

Court announces that purpose of meeting is to discuss future of the case and especially the nature and scope of future proceedings, if any, in the light of the Supreme Court's order of vacation and remand. Court hears proposals and position of counsel. Court denies Plaintiffs' request for further discovery on the issue of the duties and responsibilities of Deputy County Probation Officers, pointing out that case has already been tried on stipulated facts. Court finds no good cause is shown for taking additional evidence. Court's rulings in this regard are without prejudice to either side's advancing for consideration of the Court further material believed to be judicially noticeable which bears on

the matter of duties and responsibilities of Deputy County Probation Officers.

Counsel stipulate that in view of the decision of the Supreme Court in the *Monell* case, Plaintiffs are relieved of their prior stipulation abjuring any liability against the County under §1983. The Court states that no amendment of the complaint is necessary in this regard since liability is already asserted against the County in the existing complaint. The Court, therefore, now has before it the possibility of finding the County liable under §1983 which new issue shall be briefed whenever there is a re-briefing of the entire case.

Counsel agree and the Court orders that all proceedings in the instant case shall be stayed pending decision of the United States Supreme Court in *Norwick v. Nyquist* in which certiorari has been granted, with argument set for next fall. Counsel are ordered to notify the Court when the decision of that case is in hand so that a further hearing and discussion by the Court and counsel may be had.

Defendants' contention that entire case is moot in view of the present employment status of the three named Plaintiffs, is heard by the Court and denied.

Counsel point out to the Court that an appeal to the Ninth Circuit of the portions of the judgment dealing with damages and attorneys fees is now pending and has not been directly affected by the Supreme Court's vacation and remand order. Court suggests that Ninth Circuit be informed of today's proceeding and asked to stay its appeal pending a new and final judgment by this Court or in the alternative, that this Court on stipulation vacate the damage and attorneys fee award for reconsideration at the time the case is again argued on the merits in this Court. Counsel will discuss these

alternatives and inform the Court of how they propose to proceed.

Without objection from counsel, Court orders Supreme Court mandate filed and spread. Counsel stipulate that a minute order concerning these proceedings this day will be sufficient.

Opinion.

Chavez-Salido v. Cabell, U.S. District Court, Central District of California.

CHAVEZ-SALIDO, et al. v. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County, et al., and the COUNTY OF LOS ANGELES, No. CV 76-0541-IH, June 4, 1980.

Full Text of Opinion.

HILL, Chief Judge: — In an opinion filed February 3, 1977, and published at 427 F.Supp. 158, 17 FEP Cases 646 (C.D. Cal. 1977), this Court declared unconstitutional California Government Code Section 1031(a). That section provides that one must be a citizen of the United States to be a peace officer or to occupy any governmental position, state, county or local, which is declared by law to have the powers of a peace officer. Plaintiffs in the case are three non-citizens, each of whom sought employment by Defendant Los Angeles County as a Deputy Probation Officer II and was refused employment solely because of the citizenship requirement of the statute.

This Court's decision was appealed to the United States Supreme Court. In an order dated May 15, 1978, the judgment of this Court was vacated and the case was remanded to this Court "for further consideration in light of Foley v. Connelie, 435 U.S. 291, 17 FEP Cases 1 (1978)." 436 U.S. 901, 17 FEP Cases 699 (1978). The matter was rebriefed and was reargued on December 8, 1979.

The facts are fully set forth in the original opinion of this Court and do not need repetition here. We likewise will not repeat herein the jurisdictional discussion of the original

opinion, which we readopt.[1] In the footnote[2] we discuss the few inconsequential factual changes occurring since the original opinion was filed.

We recognize that the views of the Supreme Court with respect to the general problem of citizenship being required for employment by state and local government agencies, have been much more fully developed and expounded in two recent cases: Foley v. Connelie, supra and Ambach v. Norwick, 441 U.S. 68, 19 FEP Cases 467 (1979).[3]

Applying the newly developed principles enunciated in Foley and Ambach, we have reached the same result as we reached before. We again hold that Section 1031(a) is unconstitutional. We reach this same result on the same

---

[1]At the second argument, counsel for Plaintiffs asked to be relieved of their prior action in which they voluntarily waived any claim against the County under 42 U.S.C. Section 1983. They point to the intervening opinion of the Supreme Court in Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 17 FEP Cases 873 (1978), as having changed the previous law. As we understand their papers, defendants do not dispute the County's Section 1983 liability under Monell. At this late date, we decline to relieve counsel of their previous waiver, noting that under our previous holding the County is amenable to suit under Section 1981 and that a Section 1983 remedy would be cumulative at best.

[2]As to the functions and powers of probation officers, the parties stipulated that probation officers in California are not authorized to carry weapons. In addition, this Court took judicial notice of certain sections of California law defining the powers and functions of probation officers, which sections were not mentioned in the previous opinion. i.e., Code of Civil Procedure Section 131.3 et seq.; Penal Code Section 1203 et seq.; Welfare and Institutions Code Section 280-83, 727 et seq. We do not regard any of these sections as working any material change in the description of the duties of probation officers as contained in the original opinion.

The Court was also informed that since the publication of its original opinion, Plaintiff Chavez-Salido has left County employment altogether and no longer seeks injunctive relief with reference to appointment. However, his case is not rendered moot by that fact since his prayers for back pay and attorneys fees remain viable.

[3]The Supreme Court has also spoken on the same subject in Nyquist v. Mauclet, 432 U.S. 1 (1977), but we do not regard that opinion as of importance for our purposes.

grounds as before: 1) the statute is overbroad and 2) the statute as applied denies these plaintiffs the equal protection of the law.

I.
OVERBREADTH

In our original opinion, we discussed the status of alienage under the equal protection clause as enunciated by the Supreme Court. We believe that discussion remains valid today. Nothing in the intervening opinions of the Supreme Court would in our view undermine the proposition that citizenship may be required for governmental employment only by a statute which is "narrowly drawn" and which does not sweep "too broadly."

Footnote 5 of the Foley opinion, 435 U.S. at 296, 17 FEP Cases at 3, reaffirms the continued validity of the overbreadth criterion in the following language:

> "This is not to say, of course, that a State may accomplish this end with a citizenship restriction that 'sweeps indiscriminately', [citing Sugarman] without regard for the differences in the positions involved."

In Foley, the Statute requiring citizenship was narrowly drawn. It applied only to members of the New York State Police Force, "State Troopers." In Norwick the statute was likewise narrowly drawn. It applied only to persons who are employed "to teach in the public schools" of the state. It is noteworthy that the New York statute involved in Norwick did not confine employment as teachers to those who had their citizenship, but permitted the employment of non-citizens who had "made application" to become citizens. The California statute with which we deal permits the employment only of persons who are already citizens and, as we pointed out in our original opinion, covers a whole host

of other occupations to which the requirement of citizenship cannot be reasonably related.

We read the new decisions of the Supreme Court as continuing to emphasize that the legislature must make a reasoned judgment as to each occupation in the field of public employment for which it requires citizenship as a prerequisite. The Court's opinions seem to require that the legislature should examine the functions, duties and responsibilities of various public jobs, position by position, and determine for each that the job is so necessarily involved with the essential power of government that it should be confined to citizens.

[CALIFORNIA ENACTMENTS]

If these are the requirements, the legislative action of the California legislature with which we are concerned does not meet them. The California legislature has for over one hundred twenty five years dealt with the subject of who is a peace officer and who, additionally, is deemed to have the powers of a peace officer. The first enactments in this field appear to go back to 1851.[4] In dozens of subsequent enactments, the legislature had added one or more public positions to the list. Until 1961, all the repeated additions to the list of peace officers were enacted without any requirement that people holding these positions should be citizens.[5] Then in 1961, in one fell swoop, the legislature passed Government Code Section 1031 which applied the mandatory citizenship requirement to all of the positions on

---

[4]See Hetherington v. Cal. State Personnel Board, 82 Cal.App.3d 582, 172 Cal. Rptr. 300, 309 (1978) (Reynoso J., dissenting). Originally, only four positions were granted peace officer status: sheriff, policeman, marshal, and constable. Id.

[5]We note that the California Attorney General found no pre-1961 citizenship requirements for peace officers in his study of this matter. See Opinion No. 69-199, 53 A.G.Op. 63, 68 (1970).

the list. We are cited no legislative history or legislative findings which supply any basis or rationale for this broad new citizenship requirement.

In Footnote 22 of our prior opinion, we set forth the extensive list of positions covered by the California citizenship requirement Section 1031)a). It is to be remembered that state, county and local employees are all included if they are within any of the occupational categories on the list. We believe that Section 1031)a) is void as a law requiring citizenship which "sweeps too broadly" under the Court's original holding in Sugarman and the recent Footnote 5 in Foley. There appears to be no justification whatever for excluding aliens, even those who have applied for citizenship, from holding public employment as cemetery sextons, furniture and bedding inspectors, livestock identification inspectors and toll service employees.[6] Yet

---

[6]We note that since the publication of our original opinion, the California legislature has added a substantial number of other positions to the list appearing as Footnote 22 of the original opinion and has deleted a few positions from that list. In the interest of accuracy, the changes are hereinafter specified:

Under Section 830.1
Add: Inspectors and Investigators in Offices of District Attorney

Under Section 830.2
Add: Bay Area Rapid Transit District Officers

Under Section 830.3
Add: Narcotics agents of the Department of Justice
Add: Investigators of the State Department of Health
Delete: District Attorney investigators
Delete: "members of a fire department"

under Section 830.31
Add: Marshals and police appointed by the Director of Parks and Recreation

Under Section 830.35
Add: Policemen of the San Francisco Port Commission

Under Section 830.36
Add: Police officers appointed by the Bethel Island Municipal Improvement District

Under Section 830.4
Add: Airport security officers of the City of Palm Springs
Add: Transit police officers of the Southern California Rapid Transit District

all these are within the proscription of Section 1031)a) along with probation officers.

As will be discussed more fully in part II, infra, certain positions within the "political community" are subject to a less stringent equal protection scrutiny than those positions not within the "political community". For the purposes of this overbreadth analysis, it suffices to say that cemetery sextons, toll collectors, and persons in many other occupations within Section 1031(a) cannot be considered members of the political community no matter how liberally that category is viewed.

Thus, nothing has changed which would alter our original conclusion: Section 1031(a) is grossly overbroad and sweeps much too broadly in its proscription of alien employment.

Under Section 830.10
Add: County coroners and deputy coroners
Under Section 830.11
Add: Welfare fraud investigators or inspectors, of designated by local ordinance
Under powers of peace officers:
Delete: the Director, officers and employees of the Division of Aeronautics (Public Utilities Code Section 21252)
Delete: Any person vested with the power of enforcing any provisions of the Agriculture Code (Agriculture Code [now Food & Agriculture Code] Section 7)
Delete: Inspectors of the Bureau of Livestock Identification (Agriculture Code [now Food & Agriculture Code] Section 24032)
Delete: Officers and employees of the state part system (Public Resources Code Section 5007)
Delete: Sealers of the Department of Weights and Measures (Business and Professions Code Section 12013).

II.

THE STATUTE AS APPLIED

In their rebriefing and reargument, defendants again urge us to restrict our examination only to the validity of the statute as applied to deputy probation officers.[7] Defendants have pointed to nothing in the recent opinions of the Supreme Court which would justify such a limited examination. So we again observe that the decisions of the Supreme Court appear to rule out consideration of such a statute as applied. We again determine that the scrutiny to be afforded a statute of this kind must include an examination of whether it is too broad in its scope. This is the approach which the Supreme Court itself undertook in Sugarman, and, as indicated by the footnote in Foley, remains the proper approach to this day. But, out of an abundance of caution, we have again proceeded to examine Section 1031(a) as applied. We again hold the statute to be unconstitutional as applied to deputy probation officers as their functions and powers are defined in California law.

This examination of the statute as applied requires us to determine whether deputy probation officers fall within the group of public service positions which the states and local governments may reserve for American citizens. That group of positions was originally described in Sugarman as involving "members of the political community". The

---

[7]Defendants at the reargument made a contention not previously advanced by them, i.e., that these plaintiffs are confined to challenging the validity of Section 1031(a) only as it applies to probation officers, and have no standing to challenge the validity of the statute as it applies to other occupations. We reject this contention. Under standard equal protection analyses, and under the explicit approach of the Supreme Court in Sugarman, where there is a suspect classification, i.e., noncitizens, anyone affected by the statute would appear to have standing to challenge the statute on overbreadth grounds. This argument is really no different from that defendants made with respect to overbreadth, and we reject it for the same reasons as found in that section of our opinion.

characteristics of positions which fall within the group have been more fully expounded in Norwick and Foley.

[NORWICK CASE]

In Norwick, which held that school teachers are within the political community, the Court appears to rest the decision upon the important policy and governmental functions which public school teachers perform. The Court specifically relied on the importance of public education in our society, 441 U.S. at 76-78, and noted that the function of a schoolteacher is of paramount importance because it includes promoting civil virtues, serving as a role model and influencing the students' attitudes towards government and the political process, id. at 78-80.

We find no difficulty in holding that the function of deputy probation officers is substantially distinguishable. Probation officers do not deal with the bulk of the community. They perform none of the school teaching functions with respect either to children or adults. The relationship of probation officers to those under their supervision is far different from the relationship of a public school teacher to his pupils. The effect of probation officers on the governmental and political process is, we believe, far, far less.

In Foley the Court held that New York State Troopers were within the political community. The underlying reason was expressed as follows:

> "[I]t is because this country entrusts many of its most important responsibilities to these officers . . . [I]t represents the choice, and right, of the people to be governed by their citizen peers. To effectuate this result, we must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially

affects members of the political community." 435 U.S. at 296, 17 FEP Cases at 3.

The role of the State Troopers was also described in Foley as one involving "a very high degree of judgment and discretion, the abuse and misuse of which can have serious impact on individuals," 435 U.S. at 298, and as a person who is "vested with . . . plenary discretionary powers." Id.

Both State Troopers and deputy probation officers are generally regarded as being part of the law enforcement apparatus of the community. We have carefully compared the powers and duties of both with particular reference to the above quoted language. In so doing, we have, as required by the teachings of the Supreme Court, given great weight and respect to the determination of the state legislature in requiring citizenship as a condition of employment. But we have nevertheless concluded that the positions are vastly different and that a constitutionally permissible basis does not exist for such a citizenship requirement for deputy probation officers.

The Foley opinion, in describing the role of the State Trooper, emphasizes that he is involved in formulating and executing broad public policy, that he deals with the whole community, and that his actions immediately affect the lives of citizens in all walks of life. It also emphasizes that he is "clothed with authority to exercise an almost infinite variety of discretionary powers." 435 U.S. at 297.

We contrast this with the role of a probation officer in California. In the original opinion we described the probation officer's powers and duties in the following language:

> "Deputy probation officers in California perform a wide range of duties. They include preparation of presentence investigations and recommendations as to sentence, supervision of probationers (including efforts

to ameliorate their employment, health and family problems) and investigation of probation violations. Also included are various duties in connection with juveniles and juvenile courts among which are the filing of juvenile court petitions charging both delinquency and illegal acts, presence at juvenile court hearings in an advisory capacity, placement of minors declared to be wards of the juvenile court and supervising custodial personnel in juvenile incarceration institutions."

For the purposes of this remand, we have given even more careful and detailed consideration to those powers and duties.

No single section of California law spells out in detail all or substantially all of the duties of a probation officer. Bits and pieces of his powers are found in a number of statutes. Some of them may be thought to involve wide and important discretion and authority. For example, a probation officer may arrest a probationer believed to have violated the terms of his probation for the purpose of bringing the probationer before a court. The Court may thereafter, in its discretion, issue a warrant permitting further detention. Penal Code Section 1203.2(a). This limited power of arrest contrasts sharply with the general powers of arrest possessed by State Troopers and even ordinary policemen.

With respect to juveniles, a probation officer, under California Welfare and Institutions Code Section 628, acts as the custodian of a juvenile taken into custody by the police. After making an investigation, the probation officer has the discretion either to release the juvenile to his parents or retain him in custody. The custody will be only for a very short period pending a court hearing. The essential decision

on the subject of custody is thus a judicial one in which the probation officer is but an advisor to the court.[8]

In Foley the Court described State Troopers as exercising the functions traditionally associated with peace officers, i.e. the prevention and detection of crime, apprehension of suspected criminals, execution of warrants, search and siezure for arrest, and the carrying of weapons, 435 U.S. at 293. A California probation officer cannot be said to perform any of those functions except perhaps a limited power of arrest.

Whereas California law gives policemen the many powers mentioned above (Penal Code Section 830.1), the section which confers the status of peace officers on California probation officers (Penal Code Section 830.5) contains words of extreme limitation on the powers of the latter. We read the relevant sections of the Penal Code as allowing a probation officer to act like a policeman only in enforcing compliance by a probationer of the conditions of his pro-

---

[8]The Supreme Court has recently considered the role of a California probation officer in the Fare v. Michael C. 442 U.S. 707 (1979). In that case the question before the Court concerned a minor who, during interrogation by the police, had asked to see a probation officer who had supervised him in other juvenile court problems. No meeting with the probation officer was arranged and the interrogation continued. In the interrogation, the juvenile made damaging admissions which he sought to suppress from the juvenile court proceedings on the ground that the Miranda rule had been violated. The California Supreme Court had upheld the juvenile's contention and likened the function of a probation officer to that of an attorney; a request to see an attorney would require an end to all questioning. The Supreme Court reversed, pointing out that a probation officer has no specialized legal training and has a duty of loyalty to the state, under which he could not withhold, from the police or the courts, facts made known to him by the juvenile as to a crime then under investigation. The undisputed existence of a probation officer's duties to the state for this purpose does not in our view make the probation officer the equivalent of a policeman. The opinion of the Court was directed to matters other than the governmental function exception in the field of alienage with which we are dealing in this case.

bation and in the transportation of a probationer.[9] Moreover, as we point out in Footnote 1, supra, the California legislature does not allow probation officers to carry weapons, which right is indispensable to the function of State Troopers, policemen, and others truly having the powers of a peace officer.

When the functions and powers of a California probation officer are compared side by side with those of a New York State Trooper or any other policeman, the differences are noteworthy. The probation officer's position involves some discretion to be sure, but the discretion is far less important than the policeman's since the probation officer's decisions lack finality and are made advisory to and under the supervision of a judicial officer.

Thus, a probation officer's duties involve substantially less discretion and responsibility than either a schoolteacher's or a policeman's. Just as important is the impact of each employee on the public at large. Public schoolteachers see a great majority of children and are with them many hours of each day through their formative years. Policeman deal with the entire community. Probation officers, on the other hand, deal only with a limited number of persons who have had prior adverse contact with the judicial system. Thus, in terms of the breadth of their constituency and the width of the group they serve, there is in our view a vast distinction between public schoolteachers and

---

[9]Section 830.5 encompasses the recognition of both probation officers and state parole officers as peace officers. Probation officers are appointed by the county, while parole officers are employed by the State Department of Corrections. We read Section 830.5(a)(2), authorizing action in connection with the escape of any inmate from a state institution, to be applicable to parole officers only, and we also read Section 830.5(a)(1) where it refers to parolees to be describing only the authority of parole officers. A contrary interpretation would not in any way change today's result.

policemen on the one hand and probation officers on the other.

For the reasons stated above, we hold that the position of deputy probation officer is not within the political community. Therefore, we must apply the strict scrutiny standard and determine if a compelling state interest exists. In so doing, we reach the same result as we reached in the original opinion and hold that citizenship may not be required for the position of Deputy Probation Officer.

III.

RELIEF

In view of our reaching the same result as reached in the original opinion, the relief decreed will be the same except that the injunctive relief will not be applicable to Plaintiff Chavez-Salido. See Footnote 2, supra. We note that the single judge to whom the case was originally assigned, Judge Hill, awarded attorneys fees to the Plaintiffs. We ratify that award and authorize him to award such further attorneys fees in connection with the appeal, remand, rebriefing, and reargument as he deems appropriate. We also authorize the single judge, Judge Hill, to sign and file a final judgment in the case. Counsel for Plaintiffs will prepare and submit a proposed final judgment within 10 days. If the form of the proposed final judgment is not approved by defense counsel, the latter will have 10 days further in which to file written objections which will not change the result.

Judge Pregerson concurs in this opinion.

DISSENTING OPINION.

CURTIS, Senior District Judge, dissenting: — In our first opinion filed February 3, 1977, we declared section 1031(a) of the California Government Code unconstitutional (1) as overbroad, and (2) in violation of the Equal Protection Clause as applied to the plaintiffs herein. Upon appeal, the

Supreme Court has remanded the case "for further consideration in the light of Foley v. Connelie, 435 U.S. 291, 17 FEP Cases 1 (1978)."

I.
FACIAL OVERBREADTH CHALLENGE

Since Foley does not touch on the issue of "overbreadth", if the Supreme Court had accepted our holding on this issue, I would think it would have simply affirmed our decision, at least upon the issue of overbreadth, and that would have been the end of the matter.

But, since it did not do so, and upon remand directs our attention to the issues with which Foley was concerned and no others, I can only conclude that the Supreme Court did not agree with our holding on the issue of overbreadth.

Furthermore, it seems clear to me that plaintiffs would have no standing to challenge the statute as overbroad merely because it included categories of persons not before the court to which plaintiffs did not belong, but as to which the application of the statute might produce an unconstitutional result.

In support of my position I rely upon the Court's statement in United States v. Raines, 362 U.S. 17, 20-21 (1960):

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power — 'the gravest and most delicate duty that this Court is called on to perform.' Marbury v. Madison, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because

irreconcilable with the Constitution, except aas it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York & Philadelphia S.S. Co. v. Commissioner of Emigration, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. United States v. Wurzbach, 280 U.S. 396; Heald v. District of Columbia, 259 U.S. 114, 123; Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co., 226 U.S. 217; Collins v. Texas, 223 U.S. 288, 295-296; New York ex rel. Hatch v. Reardon, 204 U.S. 152, 160-161. Cf. Voeller v. Neilston Warehouse Co., 311 U.S. 531, 537; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513; Virginia R. Co. v. System Federation. 300 U.S. 515, 558, 1 LRRM 743; Blackmer v. United States, 284 U.S. 421, 442; Roberts & Schaefer Co. v. Emmerson, 271 U.S. 50, 54-55; Jeffrey Mfg. Co. v. Blagg, 235 U.S. 571, 576; Tyler v. Judges of the Court of Registration, 179 U.S. 405; Ashwander v. TVA, 297 U.S. 288, 347-348 (concurring opinion)."

The same rule was followed in Broadrick v. Oklahoma, 413 U.S. 601 (1973), when the Court said at 610:

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground

> that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g., Austin v. The Aldermen, 7 Wall. 694, 698-699 (1869); Supervisors v. Stanley, 105 U.S. 305, 311-315 (1882); Hatch v. Reardon, 204 U.S. 152, 160-161 (1907); Yazoo & M.V.R. Co. v. Jackson Vinegar Co., 226 U.S. 217, 219-220 (1912); United States v. Wurzbach, supra, at 399; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513 (1937); United States v. Raines, 362 U.S. 17 (1960)."

It is true that the Court has recognized some limited exceptions to this rule, but only "because of the most 'weighty countervailing policies.' " Broadrick, supra, at 611, citing Raines, supra, at 22-23. Such exceptions have been applied in most instances to cases in which a holding of unconstitutionality on only one aspect of the statute might have an impact upon persons who are not parties to the action, and who would have no effective avenue of preserving their rights themselves. An exception perhaps most often followed is where courts have been inclined to depart to some extent from traditional rules of standing so as to permit attacks on overly broad statutes affecting speech and expression which, unless stricken in their entirety, might remain as a threat or deterrent to constitutionally protected expression.

After enumerating the exceptional situations in which the standing has been allowed, the Court said:

> "Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. See, Dombrowski v. Pfister, 380 U.S. at 491; Cox v. New Hampshire, 312 U.S. 569 (1941); United States v. Thirty-seven Photographs, 402

U.S. 363 (1971); cf. Breard v. Alexandria, 341 U.S. 622 (1951)."

413 U.S. at 613.

In any event, none of the exceptions pointed out in Broadrick or Raines are applicable in construing section 1031(a), and I would therefore, in reliance upon this rule, deny plaintiffs' standing in this action.

The majority bases its holding of overbreadth upon the concept that the statute "sweeps too broadly" in that it includes occupational categories as to which the application of the citizenship requirement would be clearly unconstitutional. In doing so, it relies upon Sugarman v. Dougall, 413 U.S. 634, 635, 5 FEP Cases 1152 (1973), in which the Supreme Court struck down section 53 of the New York Civil Service Law which provided, "no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States." The Court in Sugarman recognized the right of the state to exclude non-citizens in occupational categories whose members participate directly in the formation and execution of government policy, but held that section 53 was so imprecisely and broadly drawn as to include "many positions with respect to which the State's proffered justification has little, if any, relationship." 413 U.S. at 642.

By way of explaining its decision, the Court said:

> "While we rule that §53 is unconstitutional, we do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee. We hold only that a *flat ban on the employment of aliens in positions that have little, if any,*

> *relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.*
>
> . . .
>
> Neither do we hold that a State may not, in an *appropriately defined class of positions,* require citizenship as a qualification for office."

413 U.S. at 646-47, 5 FEP Cases at 1157 (emphasis added).

The California and New York statutes are clearly distinguishable. The Court found the New York statute to be overbroad because of its failure to define the occupational categories which the state legislature wished to reserve for citizens with that degree of narrowness and precision necessary in order to distinguish between those to whom the statute could be constitutionally applied from those as to whom the statute could not be so applied. The California statute, on the other hand, although it includes a great many different occupational categories, each of these categories are defined with such narrowness and precision as will permit the application of constitutional principles on any category challenged. It is difficult to see how the occupation of probation officer[10] could be more clearly defined.

I would hold therefore that section 103(a) of the California Government Code should be upheld as against an attack for overbreadth.

II.
VALIDITY AS APPLIED

Although the Courts have held that state classifications based on alienage are, for purposes of equal protection analysis, "inherently suspect and subject to close judicial scrutiny." (Graham v. Richardson, 403 U.S. 365, 372 (1971)),

---

[10]Since the duties of a deputy probation officer are the same as a "probation officer" I make no distinction between the two in this opinion.

in Foley the Court created a significant exception where certain governmental functions are involved.

> "The individual, [upon becoming a citizen], belongs to the polity and is entitled to participate in the process of democratic decision-making. Accordingly, we have recognized 'a State's historical power to exclude aliens from participation in its democratic political institutions.' [Sugarman v. Dougall, 413 U.S. 634, 648, 5 FEP Cases 1152 (1973)], as part of the sovereign's obligation ' "to preserve the basic conception of a political community." ' 413 U.S., at 647, 5 FEP Cases at 1157.
>
> The practical consequence of this theory is that 'our scrutiny will not be so demanding where we deal with matters firmly within a State's constitutional prerogatives.' [Sugarman], supra, at 648, 5 FEP Cases at 1157. The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."

435 U.S. at 295-96, 17 FEP Cases at 2-3.

In Ambach v. Norwick, 441 U.S. 68, 19 FEP Cases 467 (1979), decided after Foley and subsequent to remand of the instant case, the Foley holding was further clarified. Said the Court:

> "The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."

441 U.S. at 75, 19 FEP Cases at 470.

Governmental Function Test.

After discussing the limited right of a state to require citizenship for certain positions, the Court provided the following guidelines for determining the applicability of the Foley exception to strict scrutiny analysis:

> "[W]e must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."

435 U.S. at 296, 17 FEP Cases at 3.

In Ambach, which involved a challenge to a citizenship requirement for teaching in the public schools, the Court further developed the governmental function test:

> "In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role."

441 U.S. at 75, 19 FEP Cases at 470.

Therefore, in determining whether the strict scrutiny or rational basis analysis should be applied, this court must apply the governmental function test to determine: (1) the degree of discretionary decisionmaking afforded probation officers under the system, and (2) the role of the probation system in the governmental structure.

In Foley, the Court was confronted with a New York State statute requiring New York State Troopers to be citizens. The Court upheld the statute's citizenship requirement on the ground that such a trooper was a member of the State Police Force, a law enforcement body which exercises broad police authority throughout the state. After discussing in some detail the varying duties which the police are called upon to perform, the Court states:

> "Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact upon individuals."

435 U.S. at 298, 17 FEP Cases at 4.

Both the Supreme Court of the United States and the Supreme Court of the State of California have recognized the very high degree of discretion and responsibility required of a probation officer in the performance of his duties. In Gagnon v. Scarpelli, 411 U.S. 778, 784 (1973), the Court said:

> "Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation."

In In re Wayne H., 24 Cal.3d 595, 601, 156 Cal.Rptr. 344, 596 P.2d 1 (1979)[11] the Supreme Court of the State of California, in discussing the responsibilities of a probation officer while conducting a juvenile investigation to determine whether the juvenile should be further detained, said:

> "While the purposes of such an interview are relatively restricted, however, the latitude given the probation officer in reaching a detention decision, and the effect of that decision on the minor, are substantial."

Probably the most sensitive area in which police officers and probation officers are both called upon to exercise dis-

---

[11]Although the Fare v. Michael C., 442 U.S. 707 (1979) opinion places portions of the California Supreme Court's opinion in In re Wayne H. in doubt, the portion dealing with the responsibilities and discretionary powers of the probation officer are in no way affected.

cretion and judgment is in the making of arrests of individuals in appropriate cases. Any arrest by whomever made is a major intrusion upon the life of the victim and the entrusting of the power and discretion upon a public officer to make or withhold an arrest is a matter of the highest concern to the state. While it is true a police officer deals with a broad segment of the citizenry, whereas a probation officer deals with a very narrow segment of the population, an arrest by a probation officer requires no less a degree of judgment or discretion than an arrest by a police officer. Any abuse or misuse of such power by either can have just as severe an impact on the individual arrested and upon society at large.

I would find no difficulty in holding that the duties of a probation officer involves a very high degree of discretionary decisionmaking which substantially affects members of the political community.

In Ambach, the Court held that teachers pursuing their role in the public education system fulfill a most fundamental obligation of government to its constituency. 441 U.S. at 78-79. The Court further said in summary:

> "Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities."

Id. at 79, 19 FEP Cases at 471 (footnote omitted).

While a teacher has both the duty and the opportunity on a day-to-day basis to work with a broad segment of school children, a probation officer through his role has the duty and the opportunity by suggestion, supervision, example, and instruction of bringing the same kind of influence to a narrow class of problem individuals, selected because of their antisocial behavior, upon whom the impact of such

influence is even more critically needed than by the normal child in the public classroom.

The majority, in distinguishing between the duties of a police officer and a teacher, on the one hand, and a probation officer, on the other, places great reliance upon the fact that policemen and school teachers exercise their discretion and responsibility in a great variety of situations and deal with large segments of the community. In my view, however, the determining factor is not the size of the arena in which the policemen or teachers exercise their judgment and discretion, or the number of times in a given period that they are called upon to exercise such judgment, nor the great variety of occasions upon which they are called to act. What is important is the weight of the impact which these judgments, when made, have upon the process of state government.

Jurors have been held so closely associated with the state's democratic political institutions that these positions may be reserved for citizens. See Perkins v. Smith. 379 F.Supp. 134 (Md. 1974), aff'd, 426 U.S. 913 (1976). Yet, a juror does not confront a broad segment of the citizenry, nor does he exercise a multitude of functions on a great number of occasions. He may only sit on one case in a lifetime, but upon this one occasion he serves such a vital part of the state's judicial function that the courts have recognized the state's right to insist that only citizens fill this role.

The probation system, and its probation officers through which it is enforced, play an integral role in the operation of the judicial system. Almost every sentence imposed by any judge upon a criminal offender is fashioned in large measure upon the recommendation of a probation officer. The impact of such recommendations upon the judicial process is only slightly less than the decision made by the judge

himself and equates favorably in importance with anything done by a police officer, a teacher or a juror in furthering the governmental function.

Application of the Rational Basis Test

In the light of the foregoing considerations, therefore, I would hold that probation officers come clearly within the "governmental function" principle recognized in Sugarman, Foley and Ambach.

It cannot be disputed that the State of California has a legitimate interest in the efficient operation of a law enforcement system in this state in which a probation officer plays an important part. Since the Constitution only requires that a citizenship requirement applicable to a probation officer bear a rational relationship to a legitimate state interest I would hold that the statute meets the rational test and should be applied.

Accordingly, I dissent.

Final Judgment.

United States District Court, Central District of California.

Jose Chavez-Salido, et al, Plaintiffs, v. County of Los Angeles, et al, Defendants. No. CV 76-0541-IH.

Filed: Aug. 15, 1980.

Entered: Aug. 19, 1980.

In this matter, an order of the Three-Judge District Court denominated "Partial Judgment" was filed on February 23, 1977. The said Partial Judgment was pursuant to an opinion of the three-judge court and was published at 427 F.Supp. 158. Pursuant to authority granted in the said Partial Judgment, District Judge Hill rendered a Final Judgment, which was filed May 27, 1977, and is unpublished. The judgment of the three-judge court of February 23, 1977, was vacated by the Supreme Court and the matter was remanded to the three-judge court for further consideration. 436 U.S. 901 (1978). The said Final Judgment of District Judge Hill was vacated and remanded by the Court of Appeals for the Ninth Circuit by an unpublished order of that court filed May 14, 1979.

Pursuant to the remand of the Supreme Court, the three-judge District Court again heard argument in the matter on December 8, 1979. Appearances before the Three-Judge District Court (and thereafter at hearings of the one-judge court) were: for Plaintiffs, Legal Aid Foundation of Los Angeles by Richard A. Paez, Esq.; for Defendants, John H. Larson, County Counsel, Los Angeles County, by Philip H. Hickok, Deputy County Counsel.

The three-judge court decided the statute in question unconstitutional in a two-judge majority opinion filed June 4, 1980, and published at .... F.Supp. .... Judge Curtis dissented. The three-judge court authorized Judge Hill to make

findings of fact and conclusions of law on the issue of damages and attorney's fees and to file a final judgment in the matter.

Argument on the matters referred to him for decision was held before Judge Hill on August 1, 1980, and he, on that date, announced findings and conclusions as to the issues referred to him. Such findings and conclusions were rendered orally. A transcript of Judge Hill's remarks on August 1, 1980, shall be filed when produced which shall constitute his said findings and conclusions.

It is appropriate that this final judgment shall now be filed, containing both the orders and judgment of the three-judge court and the orders and judgment of District Judge Hill under authority granted to him by the three-judge court. Since the orders and judgment of the three-judge court are contained in this document, it has been prepared for the signature of both Circuit Judge Pregerson and District Judge Hill, who constitute the majority of said three-judge court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED *by the Three-Judge District Court:*

1. Judgment shall be entered on behalf of Plaintiffs, Jose Chavez-Salido, Ricardo Bohorquez and Pedro Luis Ybarra, and against Defendants, relief as follows:

(a) California Government Code Sec. 1031(a), on its face and as applied to Plaintiffs, was and is in violation of the Fourteenth Amendment to the United States Constitution in that it denies Plaintiffs equal protection of the laws and it is, therefore, void and unenforceable;

(b) The actions of Defendant County of Los Angeles by and through its employees in denying Plaintiffs employment solely because of their alien status was and is in violation of 42 U.S.C. Sec. 1981;

(c) The actions of the individual Defendants and their successors in office in denying Plaintiffs employment solely because of their alien status was and is in violation of 42 U.S.C. Sec. 1983;

(d) Defendant County of Los Angeles and the individual Defendants and their successors in office are hereby permanently enjoined from enforcing and/or applying California Government Code Sec. 1031(a) against Plaintiffs Ricardo Bohorquez and Pedro Luis Ybarra.

2. The request for damages in the form of back pay by Plaintiffs Jose Chavez-Salido and Pedro Luis Ybarra is referred to Chief District Judge Irving Hill for resolution. Chief Judge Hill shall have the authority to enter any further orders and judgment on the issue of damages and other appropriate relief as he deems just and proper in accordance with the three-judge court opinions of February 3, 1977, and June 4, 1980.

3. Plaintiffs' request for attorneys' fees pursuant to 42 U.S.C. Sec. 1988 is also referred for determination to Chief District Judge Irving Hill. He shall have authority to award attorneys' fees in connection with the judgment previously entered in this action, the appeal, remand and rebriefing, and reargument, as he deems appropriate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by *District Judge Irving Hill* under authority granted by the three-judge court:

4. Plaintiffs Jose Chavez-Salido and Pedro Luis Ybarra shall, in addition to the relief granted to them by the three-judge court, recover damages as follows:

(a) Plaintiff Jose Chavez-Salido is awarded damages in the amount of $10,526.47 against Defendant County of Los Angeles;

(b) Plaintiff Pedro Ybarra is awarded damages in the amount of $8,521,42 against Defendant County of Los Angeles.

5. Plaintiff Ricardo Bohorquez is denied damages. However, Defendant County of Los Angeles shall restore Plaintiff Bohorquez to the eligibility list of Deputy Probation Officer II — Spanish-speaking with a score of 90.

6. Pursuant to the provisions of the Civil Rights Attorney's Fees Award Act of 1976, Pub.Law 94-559, 42 U.S.C. Sec. 1988, Plaintiffs' counsel are awarded reasonable attorneys' fees in the amount of $24,572. Said fees shall be paid by Defendant County of Los Angeles.

7. Interest, at the rate of 7% per annum, shall be paid on the award of attorneys' fees and damages from August 4, 1980.

8. The Court shall reserve jurisdiction over this action to allow Plaintiffs' counsel, if appropriate, to move the Court for an award of additional attorneys' fees for time expended on any appeal from this Judgment.

DATED: August 4, 1980.

/s/ HARRY PREGERSON
Harry Pregerson, Judge
U.S. Court of Appeals, 9th Circuit

/s/ IRVING HILL
Irving Hill, Judge
United States District Court

Government Code § 1031. Public Officers or Employees Having Powers of Peace Officers; Minimum Standards.

Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:

(a) Be a citizen of the United States;

(b) Be at least 18 years of age;

(c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose any criminal record;

(d) Be of good moral character, as determined by a thorough background investigation;

(e) Be a high school graduate or pass the general education development test indicating high school graduation level; provided that this subdivision shall not apply to any public officer or employee who was employed, prior to the effective date of the amendment of this section made at the 1971 Regular Session of the Legislature, in any position declared by law prior to the effective date of such amendment to be peace officer positions;

(f) Be found, after examination by a licensed physician and surgeon, to be free from any physical, emotional, or mental condition which might adversely affect his exercise of the powers of a peace officer.

This section shall not be construed to preclude the adoption of additional or higher standards, including age.

§ 830.5 Correctional, parole and probation officers.

(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, *probation officer, or deputy probation officer is a peace officer*. Except as otherwise provided in this subdivision, the authority of any such peace officer shall extend only as to conditions of parole or of probation by any person in this state on parole or probation, or to the escape of any inmate or ward from a state institution, or to the transportation of such persons. The authority of any parole officer of the State Department of Corrections shall further extend to violations of any penal provisions of law which are discovered in the course of and arise in connection with his employment. (emphasis added).

§ 131.4 Probation officer and deputies; performance of duties; powers over probationers; courts served by officers

Any of the duties of the probation officer may be performed by a deputy probation officer and shall be performed by him whenever detailed to perform the same by the probation officer; and it shall be the duty of the probation officer to see that the deputy probation officer performs his duties.

Such probation officer and each deputy probation officer shall have, as to the person so committed to the care of such probation officer or deputy probation officer, the powers of a peace officer.

The probation officers and deputy probation officers appointed under section 131.2 of this code shall serve as such probation officers in all courts having original jurisdiction of criminal actions in this State. (Added by Stats. 1939, c. 1093, § 5.)

Office-Supreme Court, U.S.
FILED
FEB 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980.

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer for the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM JUDGMENT.

MARY S. BURDICK,
WESTERN CENTER ON LAW & POVERTY, INC.
3535 West Sixth Street,
Los Angeles, Calif. 90020,
(213) 487-7211,

RICHARD A. PAEZ,
LEGAL AID FOUNDATION OF LOS ANGELES,
1550 West Eighth Street,
Los Angeles, Calif. 90017,
(213) 487-3320,

Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

Page

Introduction 2

Argument 5

I.

As Applied to Probation Officers, California Government Code Section 1031(a) Is Unconstitutional .. 5

II.

California Government Code Section 1031(a) Is Unconstitutionally Overbroad 10

A. Section 1031(a) Limits Too Wide a Range of Positions to U.S. Citizens 10

B. Appellees May Challenge the Overbreadth of California Government Code Section 1031(a) 14

Conclusion 16

Appendix A. Government Code § 1031. Public Officers or Employees Having Powers of Peace Officers; Minimum Standards 1

Appendix B. § 830.5 Correctional, Parole and Probation Officers 2

Page

TABLE OF AUTHORITIES

Ambach v. Norwick, 441 U.S. 68, 99 S.Ct. 1589 (1979) reaffirmed 490 F.Supp. 984 (C.D. Cal. 1980) 4, 5, 6, 7, 8, 9, 11, 12, 13, 16

Broadrick v. Oklahoma, 413 U.S. 601 (1973) ... 14, 15

County of Los Angeles et al. v. Jose Chavez-Salido et al., 436 U.S. 901 (1977) 3, 4, 12, 13, 16

Examining Board v. Flores de Otero, 426 U.S. 572 (1976) 5, 11, 12, 13

Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1767, 55 L.Ed.2d 287 ..... 4, 5, 6, 7, 8, 11, 12, 13

Griffiths, In re, 413 U.S. 717 (1973) 5

Sugarman v. Dougall, 413 U.S. 634 (1973) 4, 5, 6, 9, 10, 11, 12, 13, 15

United States v. Raines, 362 U.S. 17 (1960) 14, 15

Constitution

United States Constitution, Fourteenth Amendment 2, 3

Rules

Rules of the Supreme Court of the United States, Rule 16 1

Statutes

California Government Code, Sec. 1031 2

California Government Code, Sec. 1031(a) 1, 2, 3, 4, 5, 9, 10, 12, 13, 14, 15, 16

California Penal Code, Sec. 830.1 et seq. 2

California Penal Code, Sec. 830.5(a) 2

California Penal Code, Sec. 1203.2(a) 8

United States Code, Title 42, Sec. 1981 ..... 2, 3

United States Code, Title 42, Sec. 1983 ..... 2, 3

No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980.

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in his official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer for the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

MOTION TO AFFIRM JUDGMENT.

Appellees move, pursuant to Rule 16 of the Rules of this Court, for affirmance of the Judgment of the United States District Court for the Central District of California, entered on August 19, 1980. That Judgment declared that California Government Code Section 1031(a) — which states that California State and local government employees must be United States citizens if they hold one of a wide variety of positions which are statutorily classified as "peace officers" and which range from messengers and cemetery employees to police officers — violates the Equal Protection Clause

of the Fourteenth Amendment to the United States Constitution; the Judgment also declared that Appellants, who denied Appellees employment as "peace officers" solely because they were lawful resident aliens, violated 42 U.S.C. §§ 1981 and 1983. This motion is made on the ground that the District Court's Opinion and Judgment conform to, and are based on a careful analysis and application of, prior decisions of this Court. The District Court's decision below represents only one of many cases which will arise as the general principles on citizenship requirements for employment, which have already been established by this Court, are applied on a case by case basis to various State statutes. Therefore, Appellant's Jurisdictional Statement does not present any issues which are worthy of plenary consideration by this Court.

Introduction.

California Government Code Section 1031(a)[1] ["Section 1031(a)"] states that persons who are employed by the State of California or local governmental entities in jobs which are designated by statute as "peace officer" positions must be United States citizens. California Penal Code Sections 830.1 *et seq.*[2] list some of the positions defined as "peace officers," including deputy probation officers employed by local county governments. Other state and local government employees defined as "peace officers" include, for example, cemetery employees, furniture and bedding inspectors, livestock identification inspectors, sealers of the De-

---

[1]The full text of California Government Code Section 1031 is reproduced in Appendix A.

[2]California Penal Code Section 830.5(a) is reproduced in Appendix B. A list of peace officer positions is set forth in footnote 22 of the District Court's 1977 Opinion. Jurisdictional Statement, Appendix D, at 55-57.

partment of Weights and Measures, as well as a broad range of people working as part of the criminal justice system.

Appellees Jose Chavez-Salido, Ricardo Bohorquez, and Pedro Luis Ybarra ("plaintiffs") were denied employment by Appellants County of Los Angeles; Clarence E. Cabell, Acting Chief Probation Officer; Gordon T. Nesvig, Chief Personnel Officer; and Jacqualine Hasenstab, Personnel Officer for the Probation Department ("the County"), as deputy probation officers solely because they were not U.S. citizens, as required by Section 1031(a).

In the court below, plaintiffs challenged Section 1031(a) and the refusal of the County to hire them, on the grounds that Section 1031(a) violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and that the County's actions in enforcing that statute denied to plaintiffs rights guaranteed them by 42 U.S.C. §§ 1981 and 1983. Plaintiffs sought declaratory and injunctive relief, and equitable relief in the form of appointment to deputy probation officer positions and back pay.

A trial based on stipulated facts[3] was held on August 20, 1976. On February 3, 1977, the Three-Judge Court, per Irving Hill, D.J., handed down its Opinion, 427 F.Supp. 158 (C.D. Cal. 1977), granting plaintiffs the relief they sought. On February 23, 1977, the District Court entered Partial Judgment.

The County Defendants appealed the Three-Judge Court Judgment, and on May 15, 1978, this Court vacated the Partial Judgment and remanded the case to the District Court for "further consideration in light of *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1767, 55 L.Ed.2d 287 (1978)." *County*

---

[3]In addition to a joint stipulation of facts, plaintiffs also submitted uncontested affidavits attesting to their willingness to subscribe to Los Angeles County's loyalty oath.

of Los Angeles et al. v. Jose Chavez-Salido et al., 436 U.S. 901 (1977). On remand the District Court, after reconsidering the initial Judgment in light of *Foley* and the subsequent opinion of this Court in *Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589 (1979), reaffirmed its 1977 Judgment, with one judge dissenting. 490 F.Supp. 984 (C.D. Cal. 1980).

Plaintiffs submit that the District Court's majority Opinion and Judgment were based on a careful analysis and application of the prior decisions of this Court. As the District Court noted in applying the standards of *Foley v. Connelie*, 435 U.S. 291 (1978) and *Ambach v. Norwick, supra*, deputy probation officers do not fall within California's "political community." Therefore, the District Court found that the requirement of Section 1031(a) that probation officers be U.S. citizens could not withstand strict judicial scrutiny and was unconstitutional. Further, the District Court properly applied *Sugarman v. Dougall*, 413 U.S. 634 (1973), *Foley*, and *Ambach*, in finding California Government Code Section 1031(a) to be overly broad and, therefore, unconstitutional.

ARGUMENT.

I.

AS APPLIED TO PROBATION OFFICERS, CALIFORNIA GOVERNMENT CODE SECTION 1031(a) IS UNCONSTITUTIONAL.

Applying the constitutional principles established by this Court in *Foley v. Connelie, supra,* and *Ambach v. Norwick, supra,* the District Court below examined the functions of deputy probation officers to determine whether the statute requiring such officers to be citizens should be subjected to strict judicial scrutiny or the less demanding rational basis standard of review. The District Court analyzed the role and duties of probation officers within California's scheme of government, and concluded that those officers, unlike New York's police officers in *Foley* and public school teachers in *Ambach*, are not part of the State's "political community;" therefore the Court subjected the statute to strict judicial scrutiny. Since the County offered no compelling interest to justify the discriminatory classification, the District Court declared the statute, as applied to probation officers, unconstitutional.

This Court established general principles for determining whether State statutes limiting employment opportunities to U.S. citizens should be subjected to strict judicial scrutiny in *Foley, Ambach,* and earlier cases cited in those decisions, including *Sugarman v. Dougall, supra* (striking down a statute excluding aliens from State "classified service"), *In re Griffiths,* 413 U.S. 717 (1973) (invaliding the exclusion of aliens from the legal profession), and *Examining Board v. Flores de Otero,* 426 U.S. 572 (1976) (invalidating refusal to license aliens as engineers).

In general, any statute which excludes aliens from employment opportunities must be strictly scrutinized by the

courts unless the affected positions "are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." *Ambach, supra,* 99 S.Ct. at 1593. The State may prevent aliens from holding " 'important nonelective . . . positions, for officers who participate directly in the formulation, execution, or review of broad public policy [and] perform functions that go to the heart of representative government.' *Id.*, [*Sugarman, supra*] 413 U.S. at 647, 93 S.Ct. at 2850 (citation omitted)." *Id.* In applying these standards, courts "must necessarily examine each position in question to determine whether it involves discretionary decision making, or execution of policy, which substantially affects members of the political community." (footnote omitted) *Foley, supra,* 435 U.S. at 296.

The District Court below carefully followed the instruction of *Foley*, examined the duties of California probation officers, compared the probation officers to, and distinguished them from, the police officers and public school teachers which this Court has found may reasonably be required to be U.S. citizens, and concluded that, in California, probation officers have positions of relatively limited authority and discretion and do not belong to or affect the State's "political community."

This Court need not take plenary action to review whether the District Court properly applied the controlling standards to the facts of this case. The record amply supports the District Court's conclusion that California probation officers hold positions of much more limited authority, discretion, and effect than police officers and public school teachers, and are not at the heart of the State's representative government.

In assessing the role of New York state troopers, this Court noted that they occupy a government position involving "a very high degree of judgment and discretion, the abuse and misuse of which can have serious impact on individuals." *Foley, supra*, 435 U.S. at 298. The state trooper is "vested with . . . plenary discretionary powers" the execution of which substantially affects the lives of members of the general public. *Id.* As this Court emphasized: "A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other 'common occupations of the community' who *exercises no broad power over people generally.*" (emphasis added) *Id.* Specifically, New York state troopers were found to have the following powers over members of the public: to invade the privacy of an individual in public places, to break down doors to enter people's homes, to stop vehicles on public highways, to conduct searches, to arrest without a warrant, and to carry deadly weapons. *Id.*

On the other hand, probation officers in California, as members of the law enforcement community, simply do not perform the functions traditionally associated with the police. It is the police officer and not the probation officer who is responsible for the prevention and detection of crime, apprehension of suspected criminals, execution of warrants, and search and seizure for arrest; troopers may carry weapons, but probation officers may not. 490 F.Supp. at 989.

The discretionary authority of the deputy probation officer is limited; he does not have the power to affect or interfere with the lives of the general public. For example, the deputy probation officer's power of arrest is restricted to those who are under his supervision and control. As observed by the Court below, "a probation officer may arrest a probationer believed to have violated the terms of his probation for the

purpose of bringing the probationer before a court. The Court may thereafter, in its discretion, issue a warrant permitting further detention. Penal Code Section 1203.2(a). This limited power of arrest contrasts sharply with the general powers of arrest possessed by State Troopers and even ordinary policemen." 490 F.Supp. at 989. The probation officer's other duties and powers include preparation of presentence investigations and reports, supervision of probationers in the areas of health, family, and employment, investigation of probation violations, and various activities concerning juveniles, including the filing of petitions, placement, and supervision. 490 F.Supp. at 988-89.

In short, probation officers in California, unlike New York's state troopers, do not exercise "broad police authority throughout the State." *Foley, supra,* 435 U.S. at 293. They do not exercise "the basic functions of government." *Id.* at 297. Their role does not lie at the heart of California's system of government. The District Court properly concluded, therefore, that probation officers, who serve in a much more limited capacity than police officers, cannot reasonably be required to be U.S. citizens on the basis of *Foley*.

Moreover, the District Court carefully and properly compared probation officers to public school teachers, and again found the probation officer's role to be so circumscribed that a citizenship requirement could not reasonably be required.

In their limited environment, probation officers do not have the same opportunity, responsibility, or obligation to shape the attitudes and values of their probationers toward the government and the American political process as do public school teachers. Appellees recognize that probation officers do provide some counseling and guidance to those under their supervision. But it is the licensed public school

teacher who is responsible for teaching the political process, promoting civic virtues and shaping the attitudes of the general populace toward government. Probation officers deal only for a limited period of time with a very small segment of the population. As stated by the Court below, "[t]he effect of probation officers on the governmental and political process is, we believe, far, far less." 490 F.Supp. at 988.

Probation officers, to be sure, perform an important role in the law enforcement system. Yet the duties of the probation officer involve substantially less discretion and responsibility than the duties of a policeman or public school teacher. Moreover, the probation officer's sphere of influence is substantially less than is the school teacher's or the police officer's. The probation officer deals only with people who have already been brought into the criminal justice system by police, prosecutors and judges. They have no authority over, or official contact with, the general population. Certainly it cannot be said that the probation officer's role goes to "the heart of representative government." *Sugarman, supra,* 413 U.S. at 647. Accordingly, the District Court's conclusion that probation officers are not part of California's "political community" was proper and should be affirmed by this Court. Since the County has offered no convincing rationale for requiring probation officers to be U.S. citizens, the District Court's further conclusion, that California Government Code Section 1031(a), is unconstitutional as applied to probation officers, should be affirmed.

II.

CALIFORNIA GOVERNMENT CODE SECTION 1031(a) IS UNCONSTITUTIONALLY OVERBROAD.

A. Section 1031(a) Limits Too Wide a Range of Positions to U.S. Citizens.

As discussed above, the District Court properly found that Section 1031(a) improperly required California probation officers to be U.S. citizens. Therefore, as applied to plaintiffs, the statute is unconstitutional. Further, because the statute also requires persons filling an excessively broad range of positions (many of which are even more ministerial and limited in effect than probation officer jobs) to be citizens, the entire statute was properly declared unconstitutional by the District Court below on the ground it was overly broad and indiscriminate.

In *Sugarman v. Dougall, supra,* this Court struck down on equal protection grounds a New York statute that barred resident aliens from holding permanent positions in the state's competitive Civil Service. In declaring the law invalid, this Court emphasized the overly broad and indiscriminate nature of the statute; the class of positions for which citizenship was required "reaches . . . positions in nearly the full range of work tasks . . . all the way from the menial to the policy making." 413 U.S. at 640. Although the states have the power to establish the qualifications of voters, elective office holders, and holders of "important nonelective executive, legislative, and judicial positions . . . who participate directly in the formulation, execution, or review of broad public policy . . .," such discriminatory treatment has to be "narrowly confined." 413 U.S. at 647 and 649. This Court explained:

> "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic

> conception of a political community.' *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be *precisely drawn* in light of the acknowledged purpose." (emphasis added) 413 U.S. at 642-43.

Thus, in examining state statutes that discriminate against resident aliens, this Court firmly established in *Sugarman* that such discrimination would only be tolerated where the discriminatory classification was precisely tailored and confined to fit the state's objective of defining its political community.

In *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976), this Court again expressed its concern that discriminatory classifications be narrowly defined. In striking down a Puerto Rico statute which restricted the issuance of licenses for the practice of civil engineering to United States citizens, the Court observed:

> "[T]he governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and *inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn*." (emphasis added) 426 U.S. at 605.

The holdings in *Sugarman* and *de Otero* were recently reaffirmed in both *Foley v. Connelie, supra*, 435 U.S. 291 and *Ambach v. Norwick, supra*, 99 S.Ct. 1589. In *Foley*, this Court stated that if an employment classification system discriminates on the basis of alienage, the judiciary "must necessarily examine each position in question to determine whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community." 435 U.S. at 296. In an accompanying footnote, this Court further explained that:

> "This is not to say, of course, that a State may accomplish this end with a citizenship restriction that 'sweeps indiscriminately,' *Dougall*, 413 U.S. at 643, 93 S.Ct., at 2848, without regard to the differences in the positions involved." 435 U.S. at 296-97, n. 5.

In *Ambach v. Norwick, supra*, although this Court upheld New York's exclusion of aliens from public school teaching positions, it was emphasized that the "restriction is carefully framed to serve its purposes, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship." (footnote omitted) 99 S.Ct. at 1596.

California Government Code Section 1031(a) does not meet the requirement of *Sugarman* and *De Otero*, as reaffirmed in *Foley* and *Ambach*, that statutes restricting the employment opportunities of aliens be narrowly and precisely drawn. Section 1031(a) affects approximately seventy different job classifications at the state and local governmental levels. As noted by the District Court, the list ranges all the way from important law enforcement positions to positions having apparently insignificant and menial duties. Included in the latter group are sextons and superintendents of a cemetery authority and other cemetery employees, inspectors of the Bureau of Furniture and Bedding Inspection, sealers of the Department of Weights and Measures, and messengers of the State Treasury Office. 427 F.Supp. at 169-70.

Government Code Section 1031(a) fails to account for the differences in the positions affected. Thus, it is ex-

tremely difficult, if not impossible[4] for this Court or any other court to examine the nature and duties of the so-called "peace officers" in the approximately seventy positions affected by this statute. Clearly, the indiscriminate sweep of this statute prevents the Court from examining the "position to determine whether it fulfills a fundamental obligation of government to its constituency." *Foley, supra*, 435 U.S. at 297.

Not only does Section 1031(a) limit an unnecessarily wide and inexplicable range of government positions to citizens, but it is also unconstitutionally overbroad in another way. Section 1031(a) bars all aliens, even those who have declared their intent to become United States citizens, from employment in peace officer positions. In *Ambach*, this Court recognized that such a broad sweep would not be tolerated. The New York statute upheld in that case only excluded from teaching positions those aliens who refused to declare their intent to become United States citizens. The statute in issue here, on the other hand, fails to take into account willingness, desire and efforts to become a citizen.[5]

In sum, when California Government Code Section 1031(a) is examined under the principles established by this Court in *Sugarman v. Dougall, supra, Examining Board v. Flores de Otero, supra, Foley v. Connelie, supra*, and

---

[4]The judiciary's search for a rationale for inclusion of so many positions within the classification of "peace officer," and the limitation of those positions to citizens, is not assisted by reference to legislative history. Prior to 1961, "peace officers" did not have to be citizens. In 1961, Section 1031(a) was passed, imposing a citizenship requirement on the pre-existing list of jobs classified as "peace officers." The District Court below could find "no legislative history or legislative findings which supply any basis or rationale for this broad new citizenship requirement." 490 F.Supp. at 986.

[5]As the District Court below found, plaintiff Chavez-Salido had applied for U.S. citizenship before seeking employment with the County as a probation officer. 427 F.Supp. at 160.

Ambach v. Norwick, supra, there can be little doubt that the District Court's judgment merely reflects an application of those principles. The District Court's Judgment in this respect was entirely proper.

B. Appellees May Challenge the Overbreadth of California Government Code Section 1031(a).

The County, relying on *United States v. Raines*, 362 U.S. 17 (1960), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), contends that the overbreadth principles recognized in *Sugarman v. Dougall, supra*, cannot be raised by these plaintiffs to challenge the validity of the entirety of Section 1031(a). However, the County's reasoning is flawed and its reliance on *Raines* and *Broadrick* is inappropriate.

In *Sugarman*, this Court declared that a statute which limited public employment opportunities in an overly broad range of positions was unconstitutional because of its excessive reach. In that case, the entire statute was invalidated. Not only could the state not apply it to the plaintiffs before the court and to others seeking the same positions; the statute could be applied to no one.

In this case, as in *Sugarman*, plaintiffs are persons who were denied jobs because of a statute which unconstitutionally limited employment in the specific jobs they sought to citizens.[6] Further, in this case as in *Sugarman*, the statute at issue is overbroad in general, and therefore unconstitutional, as to the full range of positions covered, as well as to the positions plaintiffs sought. Thus *Sugarman* directly

---

[6]As further discussed below in this section, this Court did not specifically state in *Sugarman* that the named plaintiffs were applying for positions for which a citizenship requirement could not be imposed by any statute, regardless of how narrowly drawn. However, the positions appear obviously ministerial and limited from their titles — clerk-typist, administrative assistant, counselor, and human resources technician. 413 U.S. at 637-38.

supports plaintiffs' claim, and the District Court's holding, that plaintiffs may challenge Section 1031(a) on the ground that it is overly broad, as well as on the ground that it is unconstitutional as applied to them.

Ignoring the direct application of *Sugarman* to this case, the County argues that plaintiffs may not challenge Section 1031(a) as being overly broad since that statute may constitutionally be applied to the probation officer position for which plaintiffs applied. However, as the District Court found, and plaintiffs argue above, the County is wrong — even as applied to plaintiffs, Section 1031(a) is unconstitutional. Thus, the standing of plaintiffs to challenge the entire scope of that statute was established in *Sugarman*. The County's reliance on *Raines* and *Broadrick* — which held that plaintiffs who are *not* unconstitutionally affected by a statute ordinarily cannot challenge the statute as being overly broad — misses the point that plaintiffs here were denied their constitutional rights by Section 1031(a).

However, even if Section 1031(a) were not unconstitutional as applied to persons seeking positions as probation officers, these plaintiffs would not necessarily lack standing to challenge the statute as overly broad. The general principle expounded in *Broadrick* and *Raines* is a flexible one, and has been relaxed when speech and expression are involved, or when parties to a suit stand to lose by its outcome but yet have no effective avenue of preserving their rights themselves. *See Broadrick v. Oklahoma, supra,* 413 U.S. at 611-12.

Further, this Court has already implicitly recognized an exception to the *Broadrick-Raines* doctrine in the area of citizenship requirements applied to employment. In *Sugarman* this Court held that statutes limiting employment to citizens could be struck down as overly broad. In making that decision, this Court did not examine to any extent the

specific jobs that the plaintiffs were seeking. This Court treated the issue as irrelevant, and ignored it. As the District Court below explained in its 1977 Opinion:

> "The prior decisions of the Supreme Court dealing with alienage . . . would appear to rule out consideration of the validity of this statute as applied. Those decisions stress that the scrutiny which should be afforded to such a statute must include an examination of whether it is too broad in its sweep, overinclusive. That is why we, as the Court did in *Sugarman*, have examined all of the types of positions for which citizenship is required." 427 F.Supp. at 171.

Accord 490 F.Supp. at 987.

Clearly, Appellees have standing to challenge the facial overbreadth of California Government Code Section 1031(a).

Conclusion.

For the above reasons, Appellees submit that the County's Jurisdictional Statement does not present any issue worthy of plenary consideration by this Court. Therefore, Appellees urge the Court to summarily affirm the District Court's Judgment.

Dated this 13th day of February 1981 at Los Angeles, California.

Respectfully submitted,

MARY S. BURDICK,
RICHARD A. PAEZ,
By RICHARD A. PAEZ,
Attorneys for Appellees.

APPENDICES

APPENDIX A.

Government Code § 1031. Public Officers or Employees Having Powers of Peace Officers; Minimum Standards.

Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:

(a) Be a citizen of the United States;

(b) Be at least 18 years of age;

(c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose any criminal record;

(d) Be of good moral character, as determined by a thorough background investigation;

(e) Be a high school graduate or pass the general education development test indicating high school graduation level; provided that this subdivision shall not apply to any public officer or employee who was employed, prior to the effective date of the amendment of this section made at the 1971 Regular Session of the Legislature, in any position declared by law prior to the effective date of such amendment to be peace officer positions;

(f) Be found, after examination by a licensed physician and surgeon, to be free from any physical, emotional, or mental condition which might adversely affect his exercise of the powers of a peace officer.

This section shall not be construed to preclude the adoption of additional or higher standards, including age.

APPENDIX B.

§ 830.5 Correctional, parole and probation officers.

(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, *probation officer, or deputy probation officer is a peace officer*. Except as otherwise provided in this subdivision, the authority of any such peace officer shall extend only as to conditions of parole or of probation by any person in this state on parole or probation, or to the escape of any inmate or ward from a state institution, or to the transportation of such persons. The authority of any parole officer of the State Department of Corrections shall further extend to violations of any penal provisions of law which are discovered in the course of and arise in connection with his employment. (emphasis added).

Office-Supreme Court, U.S.
FILED
MAY 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer of the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic;

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Opening Brief for Clarence E. Cabell, *et al.*, Appellants.

JOHN H. LARSON, County Counsel,
WILLIAM F. STEWART, Chief
Labor Relations Division,
648 Hall of Administration,
500 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-1829,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Does a probation officer in California, in light of that state's statutory duties, fall within that group of public service positions which the state and local governments may reserve for American citizens; Is California's statute which requires deputy probation officers as peace officers to be United States citizens unconstitutional as applied?

2. Is the California statute which provides that public officers declared by law to be peace officers must be citizens of the United States unconstitutionally overbroad when construed in light of a separate companion statute which specifically declares and identifies deputy probation officers to be peace officers?

3. Did the plaintiffs who were applicants only for the deputy probation officer position have standing to challenge California Government Code Section 1031a as overbroad because it included by separate statutory reference other job categories?

TABLE OF CONTENTS

Page

Questions Presented i

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Summary of Argument 6

Argument 9

I.

Probation Officers in California Are a Class of Public Employees That Can Be Required to Be United States Citizens; as Applied, California Government Code § 1031a Is Constitutional 9

Significant Governmental Functions Performed by Probation Officers Which Impact on the Civil Rights of Citizens 11

a. General Responsibilities 11

b. Arrest Powers 13

c. Supervision and Rehabilitation of Criminal Offenders 14

d. Advisor to the Courts 14

e. Juvenile Supervision 15

II.

A Statute Which Provides That "Each Class of Public Officers or Employees Declared by Law to Be Peace Officers" Shall Be a Citizen of the United States Is Not Constitutionally Overbroad When a Separate Companion Statute Specifies That Probation Officers Shall Be Peace Officers 23

III.

Plaintiffs Lack Standing 29

Conclusion 32

TABLE OF AUTHORITIES CITED

Cases — Page

Ambach v. Norwick, 441 U.S. 68, 995 S.Ct. 1589 (1979) 6, 7, 9, 10, 15, 20, 21, 23, 31

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 25, 26, 27, 28, 29, 31

Chavez-Salido v. Cabell, 23 FEP Cases 112 30

Examining Board of Engineers etc., et al. v. Re Otero, 426 U.S. 572 31

Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 ..... 13, 16

Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1065 (1978) 6, 7, 9, 10, 20, 21, 23, 30, 31

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 12

Sugarman v. Dougall, 413 U.S. 634 (1973) 9, 10, 24, 25, 29, 30

Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7 (1915) 9

United States v. Raines, 362 U.S. 17 (1960) 25, 26, 31

Wayne H., In Re, 24 Cal. 3d 595, 596 P. 2d 1 (1979) 12

Constitution

United States Constitution, First Amendment 26, 30

United States Constitution, Fourteenth Amendment 2, 3, 5, 6

Miscellaneous

Critical Issues in Adult Probation: Issues in Probation Management (1979), U.S. Dept. of Justice, LEAA, p. 46 12

Critical Issues in Adult Probation: Summary (1979) U.S. Dept. of Justice, Nat. Inst. of Law Enforcement and Criminal Justice, pp. 47, 48, 50 ..... 14, 21

Page

State and County Probation: Systems in Crisis (1976) 14

The National Advisory Commission on Criminal Justice Standards and Goals in Corrections (1973) pp. 326, 327 ..... 16, 17, 18

Statutes

California Code of Civil Procedure, Sec. 131.3 et seq. 5

California Code of Civil Procedure, Sec. 131.4 .... 9, 13

California Government Code, Sec. 1031 30

California Government Code, Sec. 1031a .... i, 2, 3, 4, 5, 6, 8, 9, 23, 24, 25, 28, 29

California Penal Code, Sec. 830.1 28

California Penal Code, Sec. 830.5 ..... 3, 9, 13, 24, 25

California Penal Code, Sec. 1203 et seq. 5, 14

California Penal Code, Sec. 1203.1 14

California Penal Code, Sec. 1203.1(a) 13, 15

California Penal Code, Sec. 1203.2 ..... 13, 14

California Penal Code, Secs. 11175-11179 14

California Welfare and Institutions Code, Sec. 280-83, 727 et seq. 5

California Welfare and Institutions Code, Sec. 280 ... 16

California Welfare and Institutions Code, Sec. 283 ..... 9, 13

California Welfare and Institutions Code, Sec. 300 ... 16

California Welfare and Institutions Code, Sec. 326 ... 18

California Welfare and Institutions Code, Sec. 356 ... 19

California Welfare and Institutions Code, Sec. 601 ... 16

California Welfare and Institutions Code, Sec. 602 ... 16

California Welfare and Institutions Code, Sec. 627.5 . 15

Page

California Welfare and Institutions Code, Sec. 628 ..... 15, 17
California Welfare and Institutions Code, Sec. 629 ... 17
California Welfare and Institutions Code, Sec. 630 ..... 15, 17
California Welfare and Institutions Code, Sec. 652 ... 17
California Welfare and Institutions Code, Sec. 654 ... 19
California Welfare and Institutions Code, Sec. 654(a)(b)(c) 19
California Welfare and Institutions Code, Sec. 707 ... 18
California Welfare and Institutions Code, Sec. 727 ... 16
California Welfare and Institutions Code, Sec. 730 ... 16
California Welfare and Institutions Code, Sec. 731 ... 16
California Welfare and Institutions Code, Sec. 841 ... 19
California Welfare and Institutions Code, Sec. 850 ... 19
California Welfare and Institutions Code, Sec. 852 ... 19
California Welfare and Institutions Code, Sec. 881 ... 19
California Welfare and Institutions Code, Sec. 882 ... 19
United States Code, Title 28, Sec. 1253 2
United States Code, Title 28, Sec. 1331 2
United States Code, Title 28, Sec. 1331(a) 4, 5
United States Code, Title 28, Sec. 1343(3) 2
United States Code, Title 28, Sec. 2281 2
United States Code, Title 28, Sec. 2284 2
United States Code, Title 42, Sec. 1981 ..... 2, 3, 5, 6
United States Code, Title 42, Sec. 1983 ..... 3, 6

No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer for the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic;

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

Opening Brief for
Clarence E. Cabell, *et al.*, Appellants.

Opinions Below.

The Order of the Chief Judge of the Circuit Court convening the three-judge court and the basis for such action is set forth in the initial opinion of the three-judge district court, dated February 3, 1977, and is reproduced in Joint Appendix, p. 42, note 4. The jurisdictional basis for the Court's action was readopted in their subsequent opinion dated June 4, 1980, and reproduced in Joint Appendix 37.

The opinion of the three-judge district court (including dissent) dated June 4, 1980, from which this appeal is taken is not officially reported. It is reported as 23 FEP Cases 106 (1980) and is reproduced in Joint Appendix 76.

The opinion of the three-judge district court, dated February 3, 1978, is reported at 427 F.Supp. 158 (C.D. CA). It is reproduced in Joint Appendix 37.

Jurisdiction.

The jurisdiction of this Court is conferred by 28 U.S.C. Section 1253.

Jurisdiction of the three judge district court was based on 28 U.S.C. Section 1343(3), and 28 U.S.C. Section 1331. The three judge court was convened under 28 U.S.C. Section 2281 and 2284.

The judgment of the three-judge district court was entered August 19, 1980, and is reproduced in Joint Appendix 100.

The Notice of Appeal to this Court was filed on October 20, 1980 and is reproduced in Appendix C, to the Jurisdictional Statement.

Constitutional and Statutory Provisions Involved.

1. The Equal Protection clause of the 14th Amendment to the United States Constitution, to wit;

> "nor deny to any person within its jurisdiction the equal protection of the laws".

2. 42 United States Code § 1981

> "All persons within the jurisdiction of the United States shall have the same right in every state . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ."

3. California Government Code Section 1031(a) which provides in pertinent part:

"Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:

(a) Be a citizen of the United States: . . ."

4. California Penal Code Section 830.5 which provides in pertinent part:

"(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, probation officer or deputy probation officer is a peace officer . . ."

Statement of the Case.

This is the County of Los Angeles' second appeal in this action, the original judgment having been ordered vacated by this Court on May 15, 1978. 436 U.S. 901.

The three plaintiffs, Chavez-Salido, Bohorquez, and Ybarra, all applicants for the position of deputy probation officer with the Los Angeles County Probation Department, filed suit in federal court after being refused employment because they were not United States citizens. Their first amended complaint upon which the case was tried challenged California Government Code § 1031a which requires citizenship of employees declared by law to be peace officers (California Penal Code § 830.5 provides that probation officers are peace officers) on the grounds that it violated the equal protection clause of the 14th Amendment and contravenes two provisions of the Civil Rights Acts, 42 U.S.C. §§ 1981 and 1983. Their claim was unlawful discrimination based on alienage. Two of the plaintiffs sought money damages in the nature of back pay and all sought attorneys fees. (J.A. 41)

Appellees Chavez-Salido, Ybarra and Bohorquez, as of the date the complaint was filed, were lawfully admitted permanent resident aliens living in Los Angeles County.

Appellee Chavez-Salido applied for the job of Deputy Probation Officer II on March 27, 1975. On the required civil service examination, Chavez-Salido scored a passing grade of 95. In September he was informed a job opening existed but would have to show proof of citizenship to be to the position. Solely because he was unable to do so, he was denied this position. Chavez-Salido applied for and was granted citizenship on March 15, 1976. (J.A. 39)

Appellee Ybarra applied for the positions of Deputy Probation Officer (DPO) I and II in October and August of 1975 respectively. He was informed of the citizenship requirement for both positions and, being unable to show proof of his citizenship, was denied employment as a DPO I and a position on an eligibility list for DPO II. These denials were solely the result of the statutory citizenship requirement of Section 1031(a) of California's Government Code. Ybarra has not applied for American citizenship. (J.A. 40)

Appellee Bohorquez applied for the position of Deputy Probation Officer II in January of 1975. During the civil service examination, he was informed he could not be appointed to the position because of his lack of citizenship. In light of this information, he did not avail himself of his right to appeal the failing score he received on his examination. At the time of the court's decision, Bohorquez had not filed for United States citizenship. (J.A. 40)

All parties agreed a three-judge court was appropriate and on April 26, 1976 the Chief Judge for the Ninth Circuit convened the court from which this appeal is being taken. The case was originally tried and argued August 20, 1976 on stipulated facts and uncontradicted affadavits.

The district court held it had jurisdiction over the County of Los Angeles under 28 U.S.C. Section 1331(a) in that

Appellees' complaint stated a cause of action under both the Fourteenth Amendment and 42 U.S.C. Section 1981 and the amount in controversy exceeded $10,000.

In an opinion filed February 3, 1977, and published at 427 F.Supp. 158, 17 FEP Cases 646 (C.D. Cal. 1977) Joint Appendix 37 herein), the three-judge district court declared California Government Code Section 1031a to be unconstitutional, finding that the statute involved a suspect classification to which the strict scrutiny test must be applied.

The district court's decision was appealed to the United States Supreme Court. In an order dated May 15, 1978, this Court ordered the judgment of the three-judge district court vacated and remanded the case to the three-judge court "for further consideration in light of *Foley v. Connelie*, 435 U.S. 291, 17 FEP Cases 1 (1978)." 436 U.S. 901, 17 FEP Cases 699 (1978). The matter was rebriefed and reargued before the three-judge district court on December 8, 1979.

Since the original 1977 decision, plaintiff Chavez-Salido left County employment altogether and no longer sought injunctive relief with reference to appointment. The district court did not consider his case moot because his prayers for back pay and attorneys fees remained viable. (J.A. 77, N.2). In the second proceeding the federal district court took judicial notice of certain provisions of California law defining the powers and functions of probation officers, which statutes were not mentioned in the previous opinion, *i.e.*, Code of Civil Procedure Section 131.3 *et seq.*; Penal Code Section 1203 *et seq.*; Welfare and Institutions Code Section 280-83, 727 *et seq.* (J.A. 77, N2).

In an opinion filed June 4, 1980, the three-judge district court (with Judge Curtis dissenting) again applied the strict scrutiny test and reached the same result, declaring Section 1031a of the Government Code unconstitutional on the

grounds that the statute was 1) unconstitutionally overbroad and 2) the statute violated the Equal Protection Clause of the 14th Amendment as applied to plaintiffs herein. (J.A. 77,78). The court rejected appellants' arguments that the plaintiffs who were applicants only for the deputy probation officer position lacked standing to challenge the statute's application to other statutory classifications of peace officer (J.A. 82, note 7).

Judge Curtis dissented, being of the opinion that in light of this Court's decisions in *Foley* v. *Connelie*, 435 U.S. 291, 98 S.Ct 1065 (1978) and *Ambach* v. *Norwick*, 441 U.S. 68, 995 S.Ct 1589 (1979) that probation officers performed significant governmental functions and exercised such a high degree of discretion that they were a part of the political community and, therefore, under the guidance of *Foley* and *Ambach* a rational basis existed for the statutory restriction to U.S. citizens (J.A. 99). Moreover, Judge Curtis believed that plaintiffs, being applicants only for the position of deputy probation officer, lacked standing to challenge § 1031a's application to other statutory defined categories of peace officer. In Judge Curtis's opinion the categories of peace officer were separately and precisely defined so as to permit the application of Constitutional principles on any category challenged (J.A. 93).

On December 17, 1980, the appeal was docketed and this Court noted Probable Jurisdiction on March 9, 1981.

Summary of Argument.

The three judge district court erred in applying the strict scrutiny test to find that California's citizenship requirement for probation officers violated the Equal Protection Clause of the Constitution and 42 U.S.C. §§ 1981, 1983. California probation officers perform significant governmental functions and exercise important sovereign powers that make

them a part of the political community to whom citizenship may be a valid prerequisite for employment.

In California, and undoubtedly in all other jurisdictions, deputy probation officers exercise some of the most essential powers of government — those powers directed toward the punishment and rehabilitation of criminals and the treatment of juvenile offenders. Probation officers are an integral component of the criminal justice system, along with police officers, prosecutors, judges and jurors. They execute important and broad public policy in that area, and perform a vital role in one of the most basic and protective functions of state government.

The probation officer is given power by the court and by statute to interfere directly and deeply in the life of the probationer *on behalf of society*. He makes recommendations to the court on the sentencing and release of offenders and the terms and conditions of probation. The probation officer has the power to approve or disapprove the employment, residence, and associations of a probationer; he may, depending on case factors, also have power over his use of his income, and over his right to keep weapons. In some situations the probation officer may have the power to search and seize the probationer's person and property without a warrant. In all these, the probation officer exercises discretion in behalf of broad public policy.

An analysis of the probation officers' responsibilities and functions clearly reveals that they possess in even greater measure the important job characteristics that this Court found persuasive in upholding citizenship requirements for police officers in *Foley v. Connelie*, 435 U.S. 291 (1978), and public school teachers in *Ambach v. Norwick*, 441 U.S. 68 (1979). If citizenship may constitutionally be required of public school teachers or police officers, it is apparent in light of the role of probation officers in our criminal

justice system and the duties prescribed by the California statutes, the citizenship may also be required of probation officers.

In light of the probation officer's public responsibilities and significant role in the criminal justice system, the state need only show some rational relationship between the interest sought to be protected and the limiting classification — that rational relationship exists and California's citizenship requirement for probation officers is constitutional.

California's statutory scheme which provides that employees "declared by law to be peace officers" shall be citizens is not unconstitutionally overbroad when separate statutes identify and declare each public position to be accorded peace officer status. A reading of California Government Code § 1031a in conjunction with the specific peace officer statutes, provides an easily recognizable and explicit standard and the district court below inappropriately applied the facial overbreadth doctrine.

The plaintiffs were rejected applicants only for the position of probation officer — a position which constitutionally may be restricted to citizens. As such, the plaintiff lacked standing to challenge the application of California's citizenship statute to other occupations.

ARGUMENT.

I.

PROBATION OFFICERS IN CALIFORNIA ARE A CLASS OF PUBLIC EMPLOYEES THAT CAN BE REQUIRED TO BE UNITED STATES CITIZENS; AS APPLIED, CALIFORNIA GOVERNMENT CODE § 1031a IS CONSTITUTIONAL.

Deputy Probation Officers (hereafter referred to as probation officers)[1] by virtue of their statutory duties perform functions that not only conform to, but actually exceed the threshold criteria recognized by this Court in *Foley* and *Ambach* as justifying a citizenship requirement. The majority below, while recognizing that employment activities which promote civic virtues, serve as role models for members of society, and influence the attitude of the public toward its government and the justice system, are indicia of membership in the political community that may be reserved to citizens, erred in failing to give effect to these criteria in the context of the probation officer position.

This Court long ago recognized that there may be valid distinctions between public and private employment with regard to citizenship requirements. *Truax* v. *Raich*, 239 U.S. 33, 36 S.Ct. 7 (1915). Recently, the Court in *Foley* v. *Connelie*, 435 U.S. 291, 98 S.Ct 291 (1978) and *Ambach* v. *Norwich*, 441 U.S. 68, 99 S.Ct 1589 (1979) clarified and expounded upon the general principle announced in *Sugarman v. Dougall*,[2] 413 U.S. 634 (1973) in holding that

---

[1]The duties of a deputy probation officer in California are the same as his principal, the Probation Officer, and both are included within the citizenship requirement. (Code of Civil Procedure § 131.4, Penal Code 830.5, Welfare & Institutions Code § 283, J.A. 106)

[2]In *Sugarman, supra* at 2850 the Court indicated that when appropriately defined the state could restrict to citizens those "state elective or important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government".

when the public employment involved performance of significant governmental functions, the employee is within the basic concept of a political community which can be legitimately restricted to citizens. In such circumstances the strict scrutiny test was not applicable and the state could sustain its citizenship requirements by showing some rational relationship between the requirement and a legitimate state interest. *Foley* v. *Connelie*, *supra* at 1074; *Ambach* v. *Norwich*, *supra* at 1596.

In *Foley* the Court found that a state police officer performed such significant public functions that the position could be restricted to citizens. The Court reached the same conclusion with regard to public school teachers in *Ambach*. The Court's decisions in *Foley* and *Ambach* defined more precisely the broad doctrine announced in *Sugarman*, *supra* at 2850 that citizenship could be required of holders of "important non-elective executive, legislative and judicial positions [and] officers who participated directly in the formulations, executions, or review of broad public policy. . . ." Although police officers and public school teachers did not participate in the formulation of broad public policy, they were responsible for executing it and in so doing exercised considerable discretion. Their activities significantly impacted on other citizens so that their occupations could not be said to be a "common occupation of the community or equated with a private person engaged in routine public employment" as may be present in the more narrow disciplines or trades.

In light of the guidance established in this Court's recent decisions, the issue herein may be identified as being whether the duties of probation officers and their role in the criminal justice system place them in the *Foley* (police officer) - *Ambach* (public school teacher) classification of public employees or on the side of the more common oc-

cupations that do not perform significant public functions. Even a rudimentary analysis of the duties of a probation officer clearly indicate that they fall within the first category.

A review of the California Probation Officers statutory duties (which are not dissimilar to those existing in other states or in the federal probation service) clearly reveals that there exists an even more compelling argument that they are part of the political community than is the case with public school teachers or policemen.

Probation officers are non-elective officers who participate directly in the execution, if not the formulation, of broad public policy. They perform significant government functions, not only in helping to formulate criminal justice policy but in executing it in a manner that substantially affects all members of society. They are charged with enforcing the law and have some powers of arrest. Moreover, unlike police officers, they play a critical role in the treatment and rehabilitation of criminal offenders, both juvenile and adult. The criticality and impact of the performance of their manifold criminal justice functions clearly place them within the "political community" such that a citizenship limitation must be evaluated under the rational basis, not strict scrutiny test.

Significant Governmental Functions Performed by Probation Officers Which Impact on the Civil Rights of Citizens.

In California a probation officer performs the following broad range of duties:

a. General Responsibilities.

Probation officers perform three basic functions. Law enforcement, advisor to the courts, and treatment and rehabilitation of criminal offenders. All probation officers

including those in California perform all three functions in varying degrees at one time or another. As an essential component of the criminal and juvenile justice system, the probation officer's role has far more scope than the more limited role of the police officer.

The importance and influence and discretion of the probation officer was noted by this Court in *Gagnon* v. *Scarpelli*, 411 U.S. 778, 784 (1973) wherein the Court said:

> "Because the probation of parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation."

Similarly, in the context of juvenile detention proceedings the California Supreme Court has noted that "while the purposes of such an interview are relatively restricted, however, the latitude given the probation officer in reaching a detention decision, and the effect of that decision on the minor, are substantial." *In Re Wayne H.*, 24 Cal. 3d 595, 601, 596 P. 2d 1 (1979).

The Probation Officer's relationship with the court is substantial, direct, and an integral part of the criminal justice system. It is recognized that probation officers regularly perform quasi judicial functions.[3] A U.S. Department of Justice study on the probation systems enumerates them as follows[4]

1) Plea bargaining and sentencing influence.

---

[3]*Critical Issues in Adult Probation; Issues in Probation Management*, (1979) U.S. Dept. of Justice, LEAA, p. 46.

[4]*Id.* at 46-47.

2) Determination of which juvenile cases are appropriate for judicial processing and which should be handled informally. Like prosecutor, this function permits the probation officer to have some control over intake to the court.
3) Setting or influencing the terms and conditions of probation.
4) Enforcement of the conditions of probation and exercise of discretion in initiating probation violation procedures.
5) Administering or enforcing punishment by restricting the liberty of the person on probation.

b. Arrest Powers.

Probation Officers as peace officers have the power of arrest (California Penal Code § 830.5, Welfare and Institutions Code § 283, and Code of Civil Procedure § 131.4). Although not as broad as the arrest authority of a police officer, they have the general power of arrest within their statutory jurisdiction and may arrest upon suspicion.[5] Violation of probation is cause for immediate rearrest by the probation office without an arrest warrant (California Penal Code § 1203.2). Probation Officers may take into custody juveniles before and after court proceedings and have important release functions over adult offenders who are placed under their direct supervision. They may order the temporary release of inmates incarcerated in County jails for the purpose of preparing them for release to the community (Penal Code § 1203.1(a)).

---

[5]This Court noted in *Fare* v. *Michael C*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 at 209, note 5, that: "And a probation officer in California continues to have the powers and authority of a peace officer in connection with any violation of a criminal statute that is discovered by the probation officer in the course of his probation activities. § 282; Cal. Penal Code Ann. § 830.5 (West Supp. 1970)."

c. Supervision and Rehabilitation of Criminal Offenders.

Probation Officers play an important role in the criminal justice system through their supervisory responsibility over adult and juvenile offenders. They must insure that all conditions of probation are obeyed (Penal Code § 1203.1), and if they determine that a violation of probation has occurred, it is cause for the immediate arrest of the offender (Penal Code § 1203.2). Deputy Probation Officers supervise out-of-state parolees and must be familiar with, and dedicated to, the enforcement of not only the law of California but the law of the United States and other States (Uniform out-of-State Parolee Supervision Act, California Penal Code §§ 11175-11179).

After conviction it is upon the probation officer's shoulder that most of the burden falls in supervising the rehabilitation of the offender and his return to law abiding behavior. Society entrusts the probation officer with this most important responsibility in the hope that it will be protected from future manifestations of anti-social behavior. The importance and impact of these rehabilitation duties cannot be underestimated.[6]

d. Advisor to the Courts.

Probation Officers are required to report to the court factors to be considered in aggravation or mitigation of punishments for a crime and whether probation should or should not be granted (Penal Code § 1203). The Probation Officer's

---

[6]The United States Department of Justice, in *Critical Issues in Adult Probation; Summary* (1979) pg. 50, remarked on the results of a study reported to Congress entitled *State and County Probation; Systems in Crisis*, (1976) "The findings of the study indicated that probationers who received needed services were more likely to complete their probation periods successfully than those who did not receive the needed services".

review of the circumstances surrounding the offense, his appraisal of the individual's prior record, his assessment of the individual's adaptability to rehabilitation and his recommendations as to sentencing and probation are compelling, if not controlling, factors as to whether a convicted person will be incarcerated and how long, or freed on a term of probation. The Probation Officer's court report, which considers the social history, the past criminal record, and the current offense of the individual with a view to recommending release or incarceration, is based primarily on the probation officer's judgment of what is conducive to the good of the community (Penal Code § 1203.1a).

e. Juvenile Supervision.

In light of the role played by public school teachers that influenced the Court in *Ambach* to find that they were a part of the political community, it is instructive to review the comprehensive duties of California Probation Officers with regard to juveniles. It does not take extended analysis to establish that in many respects, and with more profound, long range implications, probation officers have even greater impact and influence on the freedom and rehabilitation of juvenile offenders than is the case with adults.

Probation Officers in California have a highly discretionary role with regard to juvenile offenders and dependent, abandoned or neglected minors. Probation Officers determine whether court proceedings should be instituted against juvenile offenders and whether to release or detain juveniles accused of criminal or delinquent acts (Welfare and Institutions Code §§ 628 and 630). They have a specific statutory responsibility to advise minors of their constitutional rights (Welfare and Institutions Code § 627.5). Probation Officers take custody of juveniles before and after court proceedings, represent the interests of juveniles in such proceedings, pre-

pare social studies on the minor and make recommendations to the court for the proper disposition of the case (Welfare and Institutions Code § 280).[7] The care, custody, control and conduct of the minor may be given to the probation officer to supervise as best he sees fit (Welfare and Institutions Code §§ 727, 730, 731).

California probation officers exercise great discretion and influence on the disposition of juvenile defenders in two critical aspects; 1) Intake, that is the decision made in evaluating the case whether to formally involve the juvenile court or to proceed without court intervention by informal counseling.[8] Which course the probation officer decides to take vitally affects the rights of the juvenile and his eventual rehabilitation. 2) Close supervision as a ward or dependent of the Court.[9]

In the typical adult criminal case, the probation officer becomes involved only after charges have been filed and

---

[7]This Court noted these responsibilities in *re* v. *Michael C*, 442 U.S. 707, 61 L.Ed.2d 197, 209 N.9.

[8]The National Advisory Commission on Criminal Justice Standards and Goals in *Corrections* (1973) pg. 326 describe the juvenile intake process as

"The process of screening cases at the juvenile level and effecting adjustments without formal court intervention appeared almost as soon as the juvenile court was created. This process commonly is called 'intake'. It appeared in different forms as juvenile courts were created in different communities. Essentially it involved discretion to look into a matter and resolve it informally. . . . .

"The process called 'intake' has been practiced in different ways by various courts resulting in a variety of procedures. In some places, it was limited to screening out cases. In other places, the process was expanded to 'unofficial probation', which meant interaction among a child, family, and probation officer with all the ingredients of probation as a disposition by the court except formal court action."

[9]A ward of the court in California is a juvenile found to have committed an act which would be a crime if he were an adult or has committed certain delinquent acts. A dependent on the other hand is a victim of parental abuse or neglect and is not personally responsible for culpable acts. California Welfare and Institutions Code § 601, 602, § 300.

usually then only after conviction. They usually play no role in the initiation of criminal charges. On the other hand, in California and elsewhere, when a juvenile is identified as being neglected or having committed some delinquent act, the probation officer assumes jurisdiction and makes the initial decision as to how the case is to be processed. In accordance with his investigation and interpretation of numerous criteria the probation officer determines whether to release the minor to the custody of his parent or guardian (Welfare and Institutions Code § 628, 629) or file a petition in the juvenile court for retention of custody (Welfare and Institutions § 630). California Welfare and Institutions Code § 652 expressly imposes upon probation officers the duty to make investigations to determine in each case whether proceedings in the juvenile court should be commenced. In this capacity, the probation officer, unlike a police officer, assumes a prosecutorial role. Needless to say, considerable discretion must be exercised in performing these functions and the ultimate affect on the juvenile and his acceptance of and adjustment to societal norms may well hang in the balance. The National Advisory Commission on Criminal Justice Standards and Goals stated in *Correction*, at pg. 327

> "Decision making at the point of intake is extremely important. Two basic decisions must be made, and both involve a considerable amount of discretion. The first decision is relatively simple: does the matter fall within the jurisdiction of the court? For example, if the allegation is delinquency, is the child within the age range for that particular State? If there is jurisdiction, the second question is whether official intervention and the authority of the court are required.
>
> "These key decisions require that competent staff be assigned to intake work. The staff must be skillful interviewers, have a broad knowledge of resources

available, and be able to make decisions quickly.

"Probation staff have provided services prior to hearings in juvenile matters for some time, but they have been reluctant to do so at the pretrial stage for adults. The contrast is sharpest in the area of detention, both prehearing and pretrial.

"The premise usually is expressed in law that a child is to be released to parents unless there is a substantial probability the child will not appear in court or would commit, before the time of the court hearing, an act that would be a crime if done by an adult. Probation staff members assess a child's potential and may be authorized by a judge or by statute to screen children away from detention. Many children therefore are not detained."

The California probation officer performs another important function in the juvenile justice system by investigating the minor's background, behavorial patterns and social history and advising the court on the minor's fitness for being dealt with under the juvenile law. When the minor is determined to be unfit, he will be tried as an adult. (California Welfare and Institutions Code § 707.)

With regard to neglected, abandoned and abused children, the probation officer's powers are equally broad as he determines whether to file a petition to declare the minor a dependent of the court and appears on behalf of the minor in proceedings against the parents to obtain custody of the child in the child's best interest. In this capacity, probation officers act as a *guardian ad litem* for the juvenile and are responsible for his direct care, custody and control, as well as representing the minor's interest in Dependency Court proceedings (Welfare and Institutions Code § 326). An extremely important and far-reaching function in terms of its impact on the rights of minors and their parents is performed by probation officers in making recommendations to the

court for removal of juveniles from the custody of their parents. (California Welfare and Institutions Code § 356.)

Probation Officers play a more expanded and intimate role in the supervision of juvenile offenders than adults. As noted earlier the probation officer may divert the juvenile offender from the formal court process under a program of supervision (Welfare and Institutions Code § 654). The scope of this form of supervision includes counseling, maintenance and operation of shelter-care facilities, crises resolution homes, and counseling and educational centers (Welfare and Institutions Code § 654(a)(b)(c)). After adjudication, the probation officer's supervisory responsibilities include both in and out of custody supervision. A probation officer is charged with home supervision of the minor to assure that the minor obeys the conditions of release and commits no public offenses pending final disposition of his case (California Welfare and Institutions Code § 841).

California Probation Officers are charged with maintaining and operating juvenile custodial facilities within their County. Minors declared wards of the Court and committed to such a facility are under the constant care, control and supervision of probation officers 24 hours a day.[10]

Under such circumstances the influence of the probation officer, the role model he exhibits to the juvenile, and the rehabilitative effect he has on his charge, exceeds that of a public school teacher. The effectiveness of the entire juvenile justice process, in which the probation officer plays the most critical role, has the most profound impact not only on the individual but on society as a whole for teaching the juvenile to be law abiding, to observe societal norms, and to recognize the civic virtues, requires inculcation of the

---

[10]California Welfare & Institutions Code §§ 850, 852, 881, 882.

basic rudiments of our democratic and constitutional way of life. A juvenile not so influenced is most likely to become the adult criminal of tomorrow.

When the substantial probation officer functions outlined earlier are measured against those job attributes recognized by this Court in *Foley* and *Ambach* as important criteria for determining whether the job holder performs a significant governmental function, the conclusion is inescapable that probation officers fall in the same category. In fact, they possess the essential characteristics of both the police officer and teacher functions. They are educators, enforcers, protectors of society, role models, rehabilitators, advisors to the courts and an integral component of the nation's criminal justice system.

As was the case with public school teachers in *Ambach*, probation officers are responsible for developing in their charges a positive attitude toward government and the political process, a recognition of the need to obey the law, and the acceptance of societal responsibilities within our democratic concept of a government of laws. Particularly in the case of juveniles, they are charged with promoting civic virtues and their personal qualities, expressed in a direct relationship with their wards, substantially influence the offender's perception, understanding, and acceptance of the responsibilities of a law abiding citizen.

The job functions noted with reference to police officers in *Foley* are likewise present, if not enhanced, in the case of probation officers. Probation officers have the power to arrest, albeit more limited. More significantly, they can in the exercise of their discretion, affect the freedom and liberty of other citizens — adults and juveniles in the supervision of their terms of probation, and juveniles in the exercise of the intake process.

Upon careful analysis, the lower court's attempted distinction of *Ambach* and *Foley* lack substance. While the district court noted that deputy probation officers are generally regarded as a part of the law enforcement apparatus of the community, act as advisors to the court, and have a unique duty to the state (J.A. 86, note 8), the court ignored the implication of those observations in determining that for citizenship purposes a probation officer is not a part of the political community.

Although in a very general sense the personal contacts arising from performance of a probation officer's duties may be narrower than a police officer's,[11] the impact of their performance extends far beyond the immediate relationship between the probationer and the offender and has tremendous consequences for the American public as a whole. How well the probation officer performs his manifold tasks has vital consequences on the efficiency of the criminal justice system, how it is perceived by the public, and how well the offender is rehabilitated and assimilated into lawful society.

The size of the population a public servant deals with on a daily or routine basis is too truncated and indeed a misleading criteria for determining whether the position in question is within the category of important non-elective officers

---

[11]A probation officer's contact with the public is not so limited as the plaintiffs might suggest. By 1976 there were 923,064 adult probation clients under state and local supervision in the United States. *Critical Issues in Adult Probation, Summary* (1979), pg. 47, U.S. Department of Justice National Institute of Law Enforcement and Criminal Justice.

The United States Department of Justice noted that: "The results of this survey emphasize the fact *that the delivery of adult probation services is a big business*, even though the individual agencies are often quite small. *In the aggregate, probation touches more lives than any other area of corrections*. The scope of probation activity alone warrants a careful study of the methods used to manage and deliver its services." *Id* at 48. (Emphasis added).

who participate in the execution of broad public policy. There are many occupations with similar characteristics that without question may properly be reserved to citizens. Trial judges, public prosecutors and jurors are relevant examples. Their immediate contact is with that narrow segment of society charged with an offense or who appear for judgment. Yet the overall role of these individuals when judged in light of their ultimate impact on our society is great. So also is the case with probation officers.

The district court similarly erred in concluding that a probation officer's exercise of discretion was far less important than a police officer is because it lacked finality. The significance of "finality" is unclear as in our system of government that are very few public employees or officers whose acts can be considered "final" in any sense meaningful to the central issue herein. A police officer initiates the criminal proceedings by arrest but his role generally concludes with his testimony, if any. The term in custody of an individual arrested by a police officer pending a court hearing can be just as short as the detention of a juvenile offender by a probation officer.

The probation officer, who in many instances may initiate an arrest or revocation of probation, plays many roles before, during and after the sentencing. In a great many cases his influence continues for years after the formal judicial proceeding and when the arresting officer, the jurors, and the prosecuting attorney are no longer involved. In our system of criminal justice we rely primarily upon the probation officer to instill in the offender those fundamental values and norms of behavior and social responsibility that are necessary in a society governed by the rule of law.

The probation officer exercises great and very consequential discretion as the court's advisor on sentencing, methods of rehabilitation, the conditions and length of pro-

bation and possible revocation of probation and reincarceration. As noted earlier, a probation officer's responsibilities with regard to juveniles is broad and pervasive and in many respects has a greater long-range impact on how the juvenile ultimately relates to society than is the case with adults.

In *Foley*, this Court remarked that it would be anomalous for citizens to be subject to the broad discretionary powers of non-citizen police officers. The same observation is true of probation officers for they complete and execute the actions initially commenced by a citizen police officer and continued on by citizen prosecutors, judges and jurors.

Clearly a rational basis exists for a citizenship requirement for probation officers, as it did in *Foley* and *Ambach*. Those that undertake the effort to qualify and become a U.S. citizen are generally more familiar with, and most importantly, more *sympathetic* to American traditions. Becoming a citizen demonstrates acceptance and allegiance to the constitution as only actual citizenship can. As the Court observed in *Ambach* v. *Norwick*, *supra* at 1594, "An oath of allegiance cannot substitute for the unequivocal legal bond citizenship represents".

Citizenship may properly be required as a condition for appointment as a probation officer in California.

II.

A STATUTE WHICH PROVIDES THAT "EACH CLASS OF PUBLIC OFFICERS OR EMPLOYEES DECLARED BY LAW TO BE PEACE OFFICERS" SHALL BE A CITIZEN OF THE UNITED STATES IS NOT CONSTITUTIONALLY OVERBROAD WHEN A SEPARATE COMPANION STATUTE SPECIFIES THAT PROBATION OFFICERS SHALL BE PEACE OFFICERS.

In addition to finding the California citizenship requirement for probation officers unconstitutional as applied, the three judge court struck down § 1031a on the ground it was

unconstitutionally overbroad in that some of the separate statutory peace officer classifications (for which plaintiffs had not applied) might not be constitutionally restricted to citizens. The district court erred in this judgment by 1) inappropriately invoking the limited overbreadth doctrine under the facts of the case and 2) in ignoring the plaintiffs clear lack of standing to raise constitutional issues as to other separate statutory classifications which did not affect them.

Unlike the statute found constitutionally offensive in *Sugarman* v. *Dougall*, 413 U.S. 634, 635 (1973), California Government Code § 1031a does not declare that all civil servants must be U.S. citizens. Section 1031a is limited to public employees "declared by law to be peace officers".

To determine which public employees are required to be citizens because they are peace officers, one must look to the California statutes to determine what classifications are declared by law to have peace officer status. The California legislature has, through the mode of separate statutory enactments encompassing related categories of public occupations, declared certain positions to have peace officer status — Penal Code § 830.5 pertaining to peace officers is one of these.

In applying § 1031a the public employer has no discretion to determine which public positions have peace officer status. That status is accorded only to those classifications so designated in other provisions of public law. On its face § 1031a cannot be enforced without consideration of companion statutes and it is this characteristic that clearly distinguishes the *Sugarman* case. Those public positions granted peace officer status are identified in severable and separate California statutes, permitting to unrestrained discretion in the public employer in requiring citizenship as a condition of employment, and allowing each job class to

be separately evaluated as to the justification for a citizenship requirement.

Although application of a citizenship requirement must be made by reference to two statutes, in this case Gov't. Code § 1031a and Penal Code § 830.5, the effect in its application to the individual seeking employment is no different than if Penal Code § 830.5 or the other peace officer statutes each included in their language a citizenship limitation.

In finding § 1031a unconstitutionally overbroad, the Court below relied solely and unjustifiably upon the *Sugarman* case, which is clearly distinguishable on its facts and ignored this Court's guidance in *United States* v. *Raines*, 362 U.S. 17 (1960) and *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). We believe that dissent below properly applied the *Raines* and *Broadrick* criteria to the facts of the instant case.

In defining the role of the federal courts in declaring statutes unconstitutional this Court observed in *Raines, supra* at 20-21:

> "In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. (Citations omitted.) The same view stated in *Broadrick*

v. Oklahoma, 413 U.S. 601 (1973), when the Court said at 610:

'Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g., *Austin v. The Aldermen*, 7 Wall. 694, 698-699 (1869); *Supervisors v. Stanley*, 105 U.S. 305, 311-315 (1882); *Hatch v. Reardon*, 204 U.S. 152, 160-161 (1907); *Yazoo & M.V.R. Co. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-220 (1912); *United States v. Wurzbach, supra*, at 399; *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 513 (1937); *United States v. Raines*, 362 U.S. 17 (1960).' "

The lower court herein chose to ignore the constraints on the application of the overbreadth doctrine repeatedly expressed by this Court and clearly germane to the instant case. The overbreadth doctrine as this Court noted in *Broadrick* has been restricted primarily to First Amendment cases when no limiting construction could be placed on the challenged statute.

"Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. See *Dombrowski v. Pfister*, 380 U.S., at 491; *Cox v. New Hampshire*, 312 U.S. 569 (1941); *United States v. Thirty-seven Photographs*, 402 U.S. 363 (1971); cf. *Breard v. Alexandria*, 341 U.S. 622." *Broadrick*, 413 U.S. at 613.

The Court also noted that application of the doctrine is disfavored when the statute at issue regulates conduct rather than expression.

The constraints on, and the very limited application of the overbreadth doctrine, were described in detail by this Court in *Broadrick* as follows.

> "But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct — even if expressive — fall within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect — at best a prediction — cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman v. United States*, 394 U.S. 165, 174-175, 89 S.Ct. 961, 966-967, 22 L.Ed.2d 176 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Id*, at 2917, 2918.

[12]Police officers are declared to be peace officers in California's Government Code § 830.1, which states in relevant part:

The court's observance in *Broadrick* above, that it is preferable to cure whatever overbreadth may exist through a case-by-case analysis is particularly germane to the issues at hand. For in striking down completely § 1031a the district court not only eliminated an admittedly valid citizenship requirement for police officers,[12] it assumed without the benefit of argument, evidence, or the presence of an aggrieved party, that other public occupations declared to have peace officer status in separate statutory provisions could not be restricted to citizens.

Looking at the matter from another perspective, would have, and could have the district court validly enjoined the application of § 1031a in conjunction with Penal Code § 830.1 (see footnote 12 below) if the plaintiffs were non-citizen applicants for the position of Los Angeles City policemen, merely on the ground that citizenship may not be constitutionally required for some other statutorily defined category of peace officer. We believe not.

Relating the overbreadth doctrine to the practical context of the case, appellants do not believe that there is any real constitutional difference between a series of independent and separate statutes each defining an occupation and specifying a citizenship requirement and a statute that imposes a citizenship requirement by reference to the other statutes, each of which separately identify the affected occupations.

---

[12]Police officers are declared to be peace officers in California's Government Code § 830.1, which states in relevant part:

"Any sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such, of a county, any policeman of a city, . . . is a peace officer."

A citizenship requirement for police officers is imposed in the same manner as for probation officers — through § 1031a by reference to Penal Code § 830.1.

III.
PLAINTIFFS LACK STANDING.

All of the plaintiffs in this case were applicants for only one class of position, deputy probation officer. There were no plaintiff applicants for any of the remaining classes of public positions granted peace officer status under other independant statutes. Being totally unaffected by the application of Section 1031a to these other job classifications, plaintiffs lacked standing to assert that Section 1031a was overbroad because it might include some categories, which upon careful analysis and with an aggrieved party may be found not to justify a citizenship restriction.

If the state can constitutionally restrict the position of probation officer to citizens, then plaintiffs are not aggrieved and lack a legal basis for raising the constitutionality of § 1031a's application to other job classifications. In this regard the *Sugarman* case was different in that the positions the plaintiffs sought were obviously ministerial and limited in scope and in the exercise of the state's sovereign power — *e.g.* clerk-typist, administrative assistant, counselor, and human resources technician. If this Court finds that the state may constitutionally limit employment to citizens in the specific job (probation officer) for which plaintiffs applied, then this Court's observations on standing in *Broadrick, supra* at 2914, 2915, are relevant and the plaintiffs are precluded from challenging § 1031a on grounds of overbreadth.[13]

---

[13]The Court noted in upholding the state statute challenged in *Broadrick*, "Moreover, even if the outermost boundaries of § 818 may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the "hard core" of the statute's proscriptions and appellants concede as much." *Broadrick* v. *Oklahoma*, 413 U.S. 600, 608

The overbreadth doctrine is related to the concept of vagueness and lack of specificity.[14] These vices, however, are not present in California's statutory scheme, or are such factors present with regard to California's citizenship requirement for probation officers. The *Sugarman* case relied upon by the majority is clearly distinguishable as the New York Statute totally failed to restrict the citizenship requirement to any particular occupation within the extremely broad category of civil service positions. Even if under the broad civil service umbrella, there existed occupations that could justifiably be restricted to citizens (such as police officers) the New York statute simply did not identify them.

The effect of the California statute is to the contrary. The California statutes, although including many different occupational categories, are fundamentally different in application as the dissent observed. "[E]ach of these categories are defined with such narrowness and precision as will permit the application of constitutional principles on any category challenged. It is difficult to see how the occupation of probation officer could be more clearly defined." *Chavez-Salido* v. *Cabell*, 23 FEP Cases at 112, J.A. 93.

This Court had no difficulty in ascertaining that Section 1031a can be applied narrowly for it noted in its opinion in *Foley* v. *Connelie, supra* at 1072, note 8, that by virtue of § 1031, California was one of 24 states besides New

---

[14]As correctly noted in the dissent, the overbreadth doctrine has been applied primarily in First Amendment cases. In those cases the Court could not have decided the case on a narrower basis because even if some behavior or occupation could constitutionally be restricted, the challenged statute was so broad in its terms that there would still remain the risk of unbridled scope and discretion in its application. In First Amendment cases this is a matter of particular constitutional concern because restraints on first amendment rights are justified only under the most compelling circumstances and this Court has continually condemned actions that have an unnecessary chilling effect on the exercise of those rights.

York that "*specifically* require United States citizenship as a prerequisite for becoming a member of a statewide law enforcement agency", (Emphasis added).

To follow the guidance of *Broadrick* and *Raines* as to the limitations on the application of the overbreadth doctrine and find the plaintiffs had no standing to raise constitutional issues outside of the context of probation officer positions is most appropriate under the facts of the case because 1) it would not result in an unconstitutional impingement of the plaintiffs' rights to employment as probation officers; 2) it would recognize and retain in effect California's constitutionally permissible restriction of police officer positions to citizens, and 3) it would conform to the oft-stated principle of this Court in citizenship cases, that each is to be decided on its merits on a case-by-case basis. *Foley* v. *Connelie*, 435 U.S. 291 at 296; *Examining Board of Engineers etc., et al,* v. *Re Otero*, 426 U.S. 572, 605.

The fact that California law provides no exception for aliens who have expressed an interest to become citizens but have not yet done so is not a dispositive factor. No such provision existed for the state trooper's position at issue in *Foley* and the district court below did not single out that point as being significant in reaching their decision. Similarly, this Court's decision in *Ambach* did not turn on the existence or non-existence of an exception for aliens who have expressed an uneffectuated intent to become a citizen. As the majority noted in *Ambach, supra* at 1599, "An oath of allegiance cannot substitute for the unequivocal legal bond citizenship represents."

Conclusion.

For the reasons stated above the order and judgment below should be reversed.

Respectfully submitted,

JOHN H. LARSON, COUNTY COUNSEL,
WILLIAM F. STEWART, Chief
Labor Relations Division,
Attorneys for Appellants.

Office-Supreme Court, U.S.
FILED
JUL 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-990
IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Brief for Jose Chavez-Salido, et al., Appellees.

MARY S. BURDICK,
DAN STORMER,
Western Center on Law & Poverty, Inc.,
3535 West Sixth Street,
Los Angeles, Calif. 90020,
(213) 487-7211,
Attorneys for Appellees,

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

Page

I.

Summary of Argument 1

II.

Argument 4

A. Section 1031(a), Which Discriminates Against Aliens, Should Be Subject to Strict Scrutiny, Despite the County's Claim That the Statute Falls Within the "Sugarman Exception" 4

1. Introduction: Section 1031(a) 4

2. The "Sugarman Exception" Is a Very Limited Exception to the Long-Standing General Rule That Statutes Which Exclude Aliens From Public Employment Cannot Withstand Strict Judicial Scrutiny 6

3. The Sugarman Exception Should Be Narrowly Interpreted Through Application of Strict Judicial Scrutiny 8

B. Section 1031(a) Violates the Equal Protection Rights of Aliens Because California Deputy Probation Officers, Unlike State Troopers and Public School Teachers, Do Not Fall Within the "Sugarman Exception" 13

1. Teachers and State Troopers Exercise Extraordinarily Important Governmental Powers, Without Direct Intervening Supervision, Over the Citizenry at Large, and Are Symbols of America's Shared Traditions and Values 14

2. California's Deputy Probation Officers Do Not Share the Characteristics of Teachers and State Troopers 17

Page

3. There Is No Other Compelling Reason for Requiring Deputy Probation Officers, Who Do Not Fall Within the "Sugarman Exception," to Be Citizens 21

C. Section 1031(a) Violates the Equal Protection Rights of Aliens Because Its Citizenship Requirement Is Not Precisely Crafted and Narrowly Written 23

D. Plaintiffs May Challenge the Excessive Reach of Section 1031(a) 30

III.

Conclusion 36

TABLE OF AUTHORITIES

Cases	Page
Ambach v. Norwick, 441 U.S. 68 (1979) 2, 3, 8, 9, 10, 12, 13, 14,	15
Baker v. Carr, 369 U.S. 186 (1962)	32
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	33
Califano v. Webster, 430 U.S. 313 (1977)	10
Castro v. State of California, 2 Cal. 3d 223, 85 Cal. Rptr. 20, 466 P. 2d 244 (1970)	11
Craig v. Boren, 429 U.S. 190 (1976)	35
Examining Board v. Flores de Otero, 426 U.S. 572 (1972) 2, 6, 7,	25
Foley v. Connelie, 435 U.S. 291 (1978) 2, 8, 9, 10, 11, 13, 16, 17,	25
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 32,	33
Graham v. Richardson, 403 U.S. 365 (1971) 2, 6, 8, 9, 10,	11
Griffiths, In re, 413 U.S. 717 (1973) 2, 6, 7, 11, 12, 18,	21
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)	31
Hetherington v. State Personnel Bd., 82 Cal.App. 3d 582, 147 Cal. Rptr. 300 (1978)	22
Nyquist v. Mauclet, 432 U.S. 1 (1977) 2, 6, 10, 13,	25
Orr v. Orr, 440 U.S. 268 (1979)	34
Oyama v. California, 332 U.S. 633 (1948)	12
Sugarman v. Dougall, 413 U.S. 634 (1973) 2, 6, 7, 8, 10, 11, 12, 13, 14, 23, 25, 26, 29, 30, 31, 33,	35
Takahashi v. Fish Comm'n., 334 U.S. 410 (1948)	12
Trimble v. Gordon, 430 U.S. 762 (1977) 10,	31

Page

Truax v. Raich, 239 U.S. 33 (1915) 7

United States v. Raines, 362 U.S. 17 (1960) 33

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 7

Constitutions

California Constitution, Art. II, Sec. 2 ..... 11, 28

United States Constitution, Art. III 4, 32

United States Constitution, First Amendment 30

United States Constitution, Fourteenth Amendment .. 1, 2, 3, 4, 5, 7, 9, 10, 20, 26, 29, 30, 33, 36

Miscellaneous

California Department of Finance, California Economic Indicators, May 1981, p. 3 13

United States Bureau of the Census, Census of Population: 1970, Subject Reports PC (2)-1D, Persons of Spanish Surname, p. 7 22

United States Department of Justice, Immigration and Naturalization Service, 1979 Annual Report of the Immigration and Naturalization Service, Table 4, p. 19 13

United States Department of Justice, Nat'l Inst. of Law Enforcement and Criminal Justice, Critical Issues in Adult Probation: Issues in Probation Management (September 1979), pp. 88, 317-33 19

United States Department of Labor, Bureau of Labor Statistics, Employment and Earnings, June 1981, pp. 38, 45-46 13

Statutes

California Agricultural Code, Sec. 3951 29

California Agricultural Code, Sec. 3956 29

California Business and Professions Code, Sec. 19035.2 29

Page

California Civil Code, Sec. 607f 29
California Government Code, Sec. 241 28
California Government Code, Sec. 242 28
California Government Code, Sec. 1001 29
California Government Code, Sec. 1020 28
California Government Code, Sec. 1031(a) .....
..... 1, 2, 3, 4, 5, 6, 13, 21, 22, 23, 25, 26, 27,
..... 29, 30, 32, 33, 34, 35, 36
California Government Code, Sec. 24000 28
California Government Code, Sec. 24001 28
California Penal Code, Secs. 830.1-830.6 5
California Penal Code, Sec. 830.1(a) 27
California Penal Code, Secs. 830.2(a)-(h) 27
California Penal Code, Sec. 830.2(a) 27
California Penal Code, Sec. 830.2(h) 5, 27
California Penal Code, Secs. 830.3(a)-(h) 28
California Penal Code, Secs. 830.3(a)-(k) 28
California Penal Code, Sec. 830.3(b) 5, 27
California Penal Code, Sec. 830.3(c) 5, 27
California Penal Code, Secs. 830.4(a)-(k) 28
California Penal Code, Sec. 830.4(d) 5, 27
California Penal Code, Sec. 830.5(a) 5, 28
California Penal Code, Sec. 830.5(b) 28
California Penal Code, Sec. 830.6(a) 28
California Penal Code, Sec. 830.7 18
California Penal Code, Sec. 830.31(b) 5, 27
California Penal Code, Sec. 1203.2 18
California Welfare and Institutions Code, Sec. 309 ... 18
California Welfare and Institutions Code, Sec. 313 ... 18

Page

California Welfare and Institutions Code, Sec. 315 ... 18

New York Civil Service Law, Sec. 53 26

Textbooks

53 Opinions of California Attorney General (1970) pp. 63, 68 ..... 23, 29

Wright, Miller & Company, Federal Practice and Procedure, Sec. 3531, pp. 205, 212 34

No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in his official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ and PEDRO LUIS YBARRA,

Appellees.

Brief for Jose Chavez-Salido, et al., Appellees.

I.
SUMMARY OF ARGUMENT.

California Government Code Section 1031(a) ["Section 1031(a)"] discriminates against legally admitted resident aliens, in violation of the Fourteenth Amendment to the Constitution of the United States, by excluding aliens from a wide range of public employment positions. Although those positions are all labeled as "peace officer" positions, they include such widely divergent jobs as messengers, local park rangers, and deputy probation officers. Plaintiffs/

appellees ("plaintiffs") were unconstitutionally denied employment in Los Angeles County as deputy probation officers because they were not United States citizens, as required by Section 1031(a).

Aliens are a discrete and insular minority for purposes of Fourteenth Amendment analysis. Any state statute which discriminates against aliens is suspect. *Graham v. Richardson*, 403 U.S. 365 (1971); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In Re Griffiths*, 413 U.S. 717 (1973); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *Nyquist v. Mauclet*, 432 U.S. 1 (1977). Therefore, the citizenship requirement of Section 1031(a) must be supported by a compelling state interest, and subjected to strict judicial scrutiny.

The defendants/appellants ("County") argue that the interest served by Section 1031(a) is the preservation of the County's "political community." This Court has indicated that a state does have a compelling interest in preserving its "political community;" however, that interest is served by a citizenship requirement only if the requirement is limited to "officers who participate directly in the formulation, execution, or review of broad public policy" since such officers "perform functions that go to the heart of representative government," and only if the statute is "precisely drawn in light of the acknowledged purpose." *Sugarman v. Dougall, supra*, 413 U.S., at 647 and 643.

The County's argument that the citizenship requirement of Section 1031(a) meets the standards of *Sugarman* does not withstand strict scrutiny. Deputy probation officers, who are required by Section 1031(a) to be citizens, do not perform functions that "go to the heart of representative government." The only two jobs which this Court has held meet that stringent test are state troopers [*Foley v. Connelie*, 435 U.S. 291 (1978)] and public school teachers [*Ambach*

v. Norwick, 441 U.S. 68 (1979)]. State troopers and teachers perform vital government functions, without any intervening supervision by other members of the political community. They exercise their authority in direct contact with the vast majority of the entire state population. And they are perceived by citizens as potent symbols of the American way of life and our shared values and traditions. Probation officers, on the other hand, are mere government functionaries. They have very limited duties and responsibilities. They do investigations and make reports to the courts, and exercise only perfunctory control over probationers. Their clientele is very small; they do not deal with the population at large. They are neither symbols nor purveyors of the shared values and traditions of this country.

Section 1031(a)'s citizenship requirement cannot withstand strict scrutiny and clearly violates the Fourteenth Amendment as the requirement is applied to probation officers. In addition, in the full range of its application Section 1031(a) violates the Fourteenth Amendment because it is not precisely crafted and narrowly written to limit it to those positions which do go to the heart of representative government. Section 1031(a) requires all "peace officers" to be citizens. Other sections of California law define over seventy job classifications as "peace officers," including voluntary fire wardens, investigators of the Board of Dental Examiners, employees of the State Department of Parks and Recreation, local park rangers, and messengers of the Treasurer's office. The fact that the California legislature did not adequately craft and precisely limit the citizenship requirement is underscored by the existence of many other statutes which inexplicably require citizenship for other public jobs. For example, county and district surveyors, veterinarians, and fish and game wardens are required by state law to be citizens. On the other hand, the state has not

imposed a citizenship requirement where it arguably would be acceptable; public school teachers in California are not required to be citizens. Therefore, Section 1031(a) is unconstitutional when considered alone, and in conjunction with the rest of the state statutory scheme for requiring citizenship of public employees, because it is both overinclusive and inexplicably underinclusive.

The plaintiffs have standing to challenge the excessive reach of Section 1031(a); they are not limited to challenging Section 1031(a) only as it has been applied to them. Plaintiffs obviously have standing within the meaning of Article III of the United States Constitution. They sought County employment and were not hired solely because of the citizenship requirement of Section 1031(a). Further, there is no prudential reason for limiting the scope of plaintiffs' suit to a challenge of Section 1031(a) only as it applies to probation officers. If such a limitation were imposed, then more than seventy additional suits would have to be brought challenging Section 1031(a) before the full scope of the citizenship requirement could be reviewed. Section 1031(a) is not precisely crafted to limit the citizenship requirement to appropriate positions, as is required by the Fourteenth Amendment. These plaintiffs have an adequate stake to raise that issue.

II.
ARGUMENT.

A. Section 1031(a), Which Discriminates Against Aliens, Should Be Subject to Strict Scrutiny, Despite the County's Claim That the Statute Falls Within the "Sugarman Exception."

1. Introduction: Section 1031(a).

This case raises the issue whether a state statute which discriminates in a wide range of public employment posi-

tions against a discrete and insular minority — legally admitted resident aliens — is based on a compelling state interest which can withstand strict judicial scrutiny. Plaintiffs contend that it cannot, and that the statute, California Government Code Section 1031(a), violates the Fourteenth Amendment to the Constitution of the United States.

Section 1031(a) states that California state and local government employees must be United States citizens if they hold any position which is statutorily classified as a "peace officer" position. A separate group of statutes, California Penal Code Sections 830.1 through 830.6, defines a wide variety of public employees, in more than seventy different job classifications, as "peace officers." For example, voluntary fire wardens,[1] investigators of the Board of Dental Examiners,[2] employees of the Department of Parks and Recreation,[3] local park rangers,[4] messengers in the Treasurer's office,[5] and probation officers and deputy probation officers[6] are statutorily classified as "peace officers." Plaintiffs all applied for positions as deputy probation officers with the County of Los Angeles, but were denied employment solely because they were not United States citizens at the time they made their applications.[7]

---

[1]Cal. Penal Code § 830.3(c).
[2]Cal. Penal Code § 830.3(b).
[3]Cal. Penal Code § 830.2(h).
[4]Cal. Penal Code § 830.31(b).
[5]Cal. Penal Code § 830.4(d).
[6]Cal. Penal Code § 830.5(a).
[7]Joint Appendix ("J.A.") 76. Plaintiff Chavez-Salido had already applied for citizenship before seeking a position as a Deputy Probation Officer II, Spanish-speaking, but nonetheless was denied employment. J.A. 21.

2. The "Sugarman Exception" Is a Very Limited Exception to the Long-Standing General Rule That Statutes Which Exclude Aliens From Public Employment Cannot Withstand Strict Judicial Scrutiny.

Aliens, who are excluded from our political processes and historically have been subject to invidious discrimination, constitute a discrete and insular minority for purposes of Fourteenth Amendment analysis; state statutes which discriminate against aliens are suspect. *Graham v. Richardson, supra*, 403 U.S., at 372: "[C]lassifications based on alienage, like those based on nationality or race, are *inherently suspect* and subject to *close judicial scrutiny*. Aliens as a class are a prime example of a *'discrete and insular' minority* [citation omitted] for whom such *heightened judicial solicitude* is appropriate." (emphasis added; footnote omitted) (invalidating a state statute denying welfare benefits to aliens). *Accord Sugarman v. Dougall, supra*, (invalidating a state statute requiring all members of New York's competitive class of the state civil service to be citizens); *In Re Griffiths, supra* (invalidating a state court rule requiring attorneys to be citizens); *Examining Board v. Flores de Otero, supra* (invalidating a Puerto Rican statute requiring engineers to be citizens); *Nyquist v. Mauclet, supra* (invalidating a state statute requiring recipients of financial assistance for higher education to be citizens).

If a state statutory scheme discriminates against aliens in public employment, as Section 1031(a) does, the state must show a compelling interest[8] in the discrimination. In addition, the state must show that the statutory scheme is precisely crafted and limited to those job categories for

---

[8]The level of interest which a state must show to support a suspect classification has been variously described as "overriding," "important," "compelling," and "substantial." *In Re Griffiths, supra*, 413 U.S., at 722, n. 9.

which United States citizenship is a constitutionally valid prerequisite.

> "In *Graham v. Richardson*, 403 U.S., at 372, we observed that aliens as a class 'are a prime example of a "*discrete and insular*" *minority* (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)),' and that classifications based on alienage are '*subject to close judicial scrutiny*.' And as long as a quarter century ago we held that the State's power 'to apply its laws exclusively to its alien inhabitants as a class is confined within *narrow limits*.' *Takahashi v. Fish Comm'n*, 334 U.S., at 420." *Sugarman v. Dougall, supra*, 413 U.S., at 642. (emphasis added).

Nonetheless in *Sugarman* this Court did note in *dicta* that a state may legitimately limit some public positions[9] to citizens, without running afoul of the Fourteenth Amendment; but the state may do so only if the citizenship requirement applies to "persons holding state elective or important nonelective executive, legislative, and judicial positions, for *officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.*" *Sugarman v. Dougall, supra*, 413 U.S., at 647 (emphasis added). Plaintiffs will refer in this brief to that group of public employment positions from which a state may exclude aliens as the "*Sugarman* exception."

---

[9]Aliens' rights to private employment have been protected for nearly a century. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) this Court invalidated an ordinance which prevented aliens from running laundries. In *Truax v. Raich*, 239 U.S. 33 (1915), a state statute requiring certain businesses to have a workforce composed of at least 80% U.S. citizens was held unconstitutional, as a restriction on aliens' rights "to work for a living in the common occupations of the community. . . ." *Id.*, at 41. More recent decisions invalidating exclusions of aliens from private employment include *In Re Griffiths, supra* (attorneys) and *Examining Board v. Flores de Otero, supra* (engineers).

In 1978, in *Foley v. Connelie, supra,* 435 U.S. 291, this Court applied the *Sugarman* exception for the first time, and held that New York State could constitutionally require state troopers to be United States citizens. This Court determined that state troopers fell within the *Sugarman* exception because their job involved "discretionary decisionmaking, or execution of policy, which substantially affects members of the political community . . .," and because the "police function fulfills a most fundamental obligation of government to its constituency." *Id.*, at 296-97.

One year later, in *Ambach v. Norwick, supra,* 441 U.S. 68, this Court upheld another New York statute which required public school teachers to be United States citizens or to have declared their intention to become citizens. In *Ambach,* public school teachers were determined to be within the *Sugarman* exception because the public education function was "so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." *Id.*, 441 U.S., at 73-74.

State troopers and public school teachers are the only two public employees who have ever been held by this Court to fit within the *Sugarman* exception. The *Sugarman* exception is a narrow one, and should be kept that way.

3. The Sugarman Exception Should Be Narrowly Interpreted Through Application of Strict Judicial Scrutiny.

Since *Graham v. Richardson, supra,* this Court has repeatedly held that aliens are a suspect class for purposes of Fourteenth Amendment analysis. To be consistent with *Graham* and its progeny, *Foley v. Connelie, supra,* and *Ambach v. Norwick, supra,* must be read as cases which the defendant won because it carried its burden of showing a compelling interest in the suspect classification, which

withstood strict judicial scrutiny, by proving that state troopers and teachers perform functions that go to the heart of representative government. Nonetheless, the opinions in *Foley*[10] and *Ambach*[11] are somewhat ambiguous, as they refer to application of a rational basis test, while at the same time citing *Graham*.

If *Foley* and *Ambach* were interpreted as applying the rational basis test to the entire constitutional analysis of the discriminatory state statutes in issue, aliens would appear to be in the anomalous position of comprising a discrete and insular minority, for purposes of Fourteenth Amendment analysis, but not being entitled to the protection of close judicial scrutiny which that status affords other groups. Such an anomalous status would be especially perplexing in light of this Court's statement that classifications based on alienage "are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right

---

[10] "Following *Graham* a series of decisions has resulted requiring state action to meet close scrutiny to exclude aliens as a class from . . . eligibility for a broad range of public employment, *Sugarman v. Dougall, supra* . . . .

"It would be inappropriate, however, to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny' . . . .

" '[O]ur scrutiny will not be so demanding where we deal with matters firmly within a state's constitutional prerogatives.' *Dougall, supra*, at 648. The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."

Foley v. Connelie, supra, 435 U.S., at 295-96.

[11] "The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court. [citations omitted.].

"Applying the rational basis standard, we held last Term that New York could exclude aliens from the ranks of its police force." *Ambach v. Norwick, supra*, 441 U.S., at 74.

is impaired." *Graham v. Richardson, supra,* 403 U.S., at 376.[12]

Thus, *Foley* and *Ambach* must be read to stand for the proposition that a compelling interest test is to be applied to the initial inquiry into whether the challenged statute affects positions that are within the *Sugarman* exception. The strict scrutiny standard of review must be applied to that initial inquiry, and the state should bear a heavy burden of proof and persuasion that the affected positions do fall within the *Sugarman* exception. Only if that burden is met should the rational basis test be applied to the question whether the citizenship requirement is related to the duties of the employees falling within the *Sugarman* exception.

Such a two-step approach would be consistent with all prior decisions of this Court, from *Graham* through and including *Ambach* and *Foley*.[13] Such an approach would also ensure the continued special meaning of this Court's rulings that all groups which comprise discrete and insular minorities are entitled to an extra measure of protection against discrimination under the Fourteenth Amendment.[14]

---

[12]The *Graham* approach was reaffirmed in *Nyquist v. Mauclet, supra,* in which this Court invalidated a state law preventing aliens from receiving state financial assistance for higher education. In *Nyquist* this Court expressly rejected the argument that because financial aid for education is not a basic necessity of life, the discriminatory state statute should not be subjected to strict judicial scrutiny. *Nyquist v. Mauclet, supra,* 432 U.S., at 8, n. 9.

[13]In *Foley*, only after first determining that state troopers fell within the *Sugarman* exception, this Court went on to note that "the police function is one where citizenship bears a rational relationship to the special demands of the particular position." *Foley v. Connelie, supra,* 435 U.S., at 300.

[14]Even groups which have not been held to constitute discrete and insular minorities, such as women and illegitimate children, are afforded a greater degree of judicial scrutiny of statutes that discriminate against them than a merely perfunctory judicial search for a rational basis behind the discrimination. *Califano v. Webster*, 430 U.S. 313, 316-17 (1977) (women); *Trimble v. Gordon*, 430 U.S. 762, 766-67 (1977) (illegitimate children). It would be doubly troubling if the standard for reviewing a suspect classification against aliens were less than that afforded other groups not recognized as discrete and insular minorities, and could even call in question the permanency of the somewhat heightened protection afforded such other groups.

Applying strict scrutiny to the initial inquiry — whether the affected positions (here probation officers) fall within the *Sugarman* exception — would also be appropriate for all the reasons that led this Court to first hold that classifications which discriminate against aliens are suspect. Despite the fact that aliens are productive and valuable members of our society,[15] they are excluded from the ballot, and therefore from the political process, and have been subjected to a long history of discrimination.

In California, aliens may not vote.[16] Therefore, they are unable to redress their grievances through the political process, and so need special protection. Also, unfortunately, California shares the sad history of the entire country of prejudice and discrimination against aliens. In *Castro v. State of California*, 2 Cal. 3d 223, 85 Cal. Rptr. 20, 466 P. 2d 244 (1970), the California Supreme Court chronicled some of the bigotry that surrounded passage of a state constitutional provision at the turn of the century requiring voters to pass an English literacy test. Included in the Court's description are tirades by state legislators and state court judges, among others, describing aliens as "inferior," "ignorant," "debased," "vicious," and "reckless." *Id.*, 2 Cal. 3d, at 230-31, nn. 11 and 14.

The outbreak of prejudice against aliens which occurred during the World Wars has already been recognized by this

---

[15]"[W]e have often been described as 'a nation of immigrants.' " *Foley v. Connelie, supra*, 435 U.S., at 294. " 'Aliens like citizens pay taxes and may be called into the armed forces. . . . [A]liens may live within a state for many years, work in the state and contribute to the economic growth of the state.' [citations omitted]." *Graham v. Richardson, supra*, 403 U.S., at 376. "[Aliens'] contributions to the social and economic life of the country were self-evident, especially during the periods when the demand for human resources greatly exceeded the native supply." *In Re Griffiths, supra*, 413 U.S., at 719.

[16]Cal. Const. Art. II, § 2.

Court. The "frantic and overreactive days of the First World War when attitudes of parochialism and fear of the foreigner were the order of the day,"[17] were followed closely by wide-ranging efforts to exclude aliens from employment at the time of the Second World War.[18] Some of California's discriminatory statutes from the 1940's have already been the subject of landmark decisions by this Court. *Takahashi v. Fish Comm'n.*, 334 U.S. 410 (1948) (striking down a California statute which barred aliens from holding fishing licenses); *Oyama v. California*, 332 U.S. 633 (1948) (invalidating California's Alien Land Law, which prevented aliens from owning or leasing agricultural land).

Because aliens are excluded from the political process and have suffered a long history of discrimination, plaintiffs urge this Court to reaffirm its earlier holdings that aliens are a discrete and insular minority and to apply strict scrutiny to the County's claim that deputy probation officers fall within the *Sugarman* exception. Such an approach should stringently limit the reach of the *Sugarman* exception to a narrowly isolated group of vital, basic, symbolic government officers.

Unless the *Sugarman* exception is limited to a very narrow range of extraordinary public employment positions, that exception could swallow the rule that aliens have a right to work for a living in the "common occupations of the community," whether public or private. *Sugarman v. Dougall, supra*, 413 U.S., at 641. One out of every six persons in the nonagricultural workforce is employed by some governmental entity; the great majority work for state and local

---

[17] *Ambach v. Norwick supra*, 441 U.S., at 82 (Blackmun, J., dissenting).

[18] *In Re Griffiths, supra*, 413 U.S., at 719 and n. 5.

governments.[19] More than 1.3 million aliens reside in California.[20] Given these figures, if the State of California's authority to exclude aliens from public employment is broadly interpreted, the efforts of hundreds of thousands of legally admitted, permanent resident aliens to find employment and to support themselves and their families would be devastated.[21]

Therefore, plaintiffs urge this Court to carefully scrutinize the County's claim in this case that probation officers fall within the *Sugarman* exception and to limit narrowly the definition of the class of public positions which do fall within that exception.

B. Section 1031(a) Violates the Equal Protection Rights of Aliens Because California Deputy Probation Officers, Unlike State Troopers and Public School Teachers, Do Not Fall Within the "Sugarman Exception."

In *Foley* and *Ambach* this Court held that state troopers and public school teachers fall within the *Sugarman* exception. Plaintiffs will first analyze the specific duties and

---

[19]In May, 1981, of a total nonagricultural work force nationwide of approximately 91,860,000 people, 2,782,000 (3%) worked for the federal government and 13,572,000 (14.7%) worked for a state or local government. U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, June 1981, pp. 38, 45-46. The figures are similar in California, where in March of 1981, of a total nonagricultural wage and salary work force of approximately 10,037,300 people, 322,200 (3.2%) worked for the federal government and 1,444,400 (14.4%) worked for the state or a local governmental entity. California Department of Finance. *California Economic Indicators*, May 1981, p. 3.

[20]U.S. Department of Justice, Immigration and Naturalization Service, *1979 Annual Report of the Immigration and Naturalization Service*, Table 4, p. 19.

[21]Broad limitations on employment opportunities can "deprive aliens of the essential means of economic survival." *Nyquist v. Mauclet*, *supra*, 432 U.S., at 13 (Burger, C.J., dissenting).

shared characteristics of state troopers and public school teachers, concluding that both teachers and state troopers perform vital governmental functions, without intervening supervision by other members of the state's political community, can exercise extraordinary compulsory authority over the vast majority of the state's citizenry, and are potent symbols of America's shared values and traditions. Plaintiffs then compare the more limited tasks performed by probation officers in California, concluding that probation officers should not be grouped with state troopers and teachers as members, and governors, of the state's political community. The County has not carried, and cannot carry, its burden of showing that it has a compelling interest in including probation officers within the *Sugarman* exception.

1. Teachers and State Troopers Exercise Extraordinarily Important Governmental Powers, Without Direct Intervening Supervision, Over the Citizenry at Large, and Are Symbols of America's Shared Traditions and Values.

Public school teachers, who this Court held in *Ambach* may be required to apply for U.S. citizenship, fulfill " 'perhaps the most important function of state and local governments. . . . [Education] is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.' *Brown v. Board of Education*, 347 U.S. 483, 493, (1954)." *Ambach, supra*, 441 U.S., at 76-77.

Public school teachers fulfill this vital function in direct contact with their students, out of the presence of any other representatives of the political community. What happens on a day-to-day basis in the classroom is unsupervised and largely within the teacher's discretion. "Alone among em-

ployees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. . . . [T]eachers by necessity have wide discretion. . . ." *Ambach, supra,* 441 U.S., at 78.

Further, the authority of teachers extends to almost the entire population.[22] All American residents are compelled by state law to spend many years of their lives, for long periods of each school day, in attendance before, and under the control of, school teachers.

Moreover, public school teachers, regardless of what they may actually do each day during work hours, are symbols of America's shared values and are perceived as important purveyors of those values by action and example. "[A]uthorities have perceived public schools as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground. [citation omitted] These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. [citations omitted]." *Ambach, supra,* 441 U.S., at 77.

State troopers share many important characteristics with teachers. They too perform one of the most fundamental obligations of government — the protection of the citizenry by the enforcement of the laws. Specifically, they are charged with "the prevention and detection of crime, the apprehension of suspected criminals, investigation of suspect conduct, execution of warrants and have powers of search, seizure and arrest without a formal warrant under limited circumstances. In the course of carrying out these

---

[22]In New York, more than 80% of all school children attended public school. *Ambach, supra,* 441 U.S., at 86 (Blackmun, J., dissenting).

responsibilities an officer is empowered by New York law to resort to lawful force, which may include the use of any weapon that he is required to carry while on duty." *Foley, supra*, 435 U.S., at 293. State troopers may also "invade the privacy of an individual in public places," "break down a door to enter a dwelling or other building in the execution of a warrant . . . or without a formal warrant in very limited circumstances," "stop vehicles traveling on public highways" and then "within limits, require a driver or passengers to disembark and even search them for weapons," and, of course, the state trooper may make arrests "without prior judicial authority, as when an officer observes a criminal act in progress or suspects that felonious activity is afoot." *Foley, supra*, 435 U.S., at 297-98. In short, the compulsory, forceful powers of state troopers are extraordinary, and draconian if not properly administered.

State troopers, like teachers, exercise their state powers in direct contact with the general population, out of the presence of any other representatives of the political community. What happens on a day-to-day basis on the streets is unsupervised and largely within the trooper's discretion. "[T]his country entrusts many of its most important policy responsibilities to these officers, the discretionary exercise of which can often more immediately affect the lives of citizens than even the ballot of a voter or the choice of a legislator." *Foley, supra*, 435 U.S., at 296. State troopers are "clothed with authority to exercise an almost infinite variety of discretionary powers." *Id.*, at 297.

Further, the authority of the state trooper, like that of the teacher, extends to the entire population, not just to a small group of people. Even though all citizens do not regularly come in contact with state troopers for extended periods of time, the "police presence is pervasive." *Foley*, 435 U.S., at 297. The police are visibly present in all communities,

and anyone who is out and about business in the community will see, regularly, the uniformed and armed police officer.

Moreover, state troopers, regardless of what they may actually do each day on the beat during work hours, are perceived as symbols of America's shared values and traditions and enforcers of America's shared laws. In short, the uniformed and armed policeman on the street is the ultimate symbol of the compulsory authority of the state.

Teachers and state troopers, therefore, share certain characteristics which place them "at the heart of our political institutions." *Id.*, at 296. They perform vital governmental functions, without intervening supervision by other members of the political community; they exercise their authority in direct contact with the vast majority of the state's population; and they are perceived as potent symbols of the American way of life and our shared values and traditions.

2. California's Deputy Probation Officers Do Not Share the Characteristics of Teachers and State Troopers.

Deputy probation officers,[23] unlike teachers and state troopers, are authorized to perform only limited, basically ministerial duties.[24] The population they serve is small, and

---

[23]Deputy probation officers and regular probation officers perform the same functions. J.A. 93, n. 10. Therefore, no distinction is made in the analysis above between the two positions.

[24]The record in this case concerning what deputy probation officers actually do with their time during the work day, as opposed to what they are authorized by law to do, is limited. The parties stipulated that the members of the three judge court, all of whom had extensive experience as California state trial court judges, could take judicial notice of the duties of probation officers based on their own observations and experiences. J.A. 62. In addition, the court took judicial notice of statutes which describe some of the powers of probation officers in California, and the parties stipulated to one fact about probation officers: that they do not carry firearms. J.A. 77, n. 2. After this Court remanded this case for reconsideration in light of *Foley v. Connelie*, plaintiffs moved for leave to do discovery, in order to augment the record to show what probation officers actually do, so that a more thorough comparison with this Court's decision in *Foley* could be made. That motion was denied. J.A. 73.

comes under their control only after the police, judges, and juries have first determined that they are in need of supervision. Further, probation officers are not important symbolic figures.

While plaintiffs do not denigrate the work of probation officers, those officers simply do not perform vital functions that go to the heart of a representative government. Probation officers merely do investigations, and then make reports and offer suggestions on sentencing, probation, and placement of juveniles to those government officers who are the ones who ultimately do exercise the state's power of governance — judges. J.A. 62. Thus, their duties in relation to the judicial system are much less important than are counsel's. Yet, in *In Re Griffiths, supra*, this Court held that aliens may be lawyers, even though lawyers act as officers of the court, with authority to sign writs and subpoenas, administer oaths, take depositions, and acknowledge deeds. *Id.*, 413 U.S., at 723.

Further, probation officers' powers of arrest and detention are severely limited both as to the conditions under which they may detain someone, and as to the very small group of people whom they may detain. Probation officers may only arrest probationers under their jurisdiction, and then only for the purpose of bringing them before the court, where it is determined whether they should be held or released.[25] Probation officers may detain juveniles only for short periods of time in emergency situations.[26]

---

[25]J.A. 85. Cal. Penal Code § 1203.2. The State has given limited powers of arrest to other people, but does not designate them as peace officers or require that they be citizens. For example, security officers at private educational institutions may make arrests but are expressly excluded from the peace officer definition. Cal. Penal Code § 830.7.

[26]Probation officers must immediately release minors into the custody of their parents, guardian, or other responsible relative, unless there are extraordinary circumstances, such as the minor being subjected to neglect, cruelty, depravity, or physical abuse at home or being physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality. Cal. Welf. & Inst. Code § 309. Even in such emergency circumstances, the probation officer must file a petition with the court within forty-eight hours, and hearing must be held on that

The County in its Opening Brief makes much of the role of the probation officer as teacher, counselor and role model. However, the very reports cited to by the County reflect that generally probation officers spend only about one-quarter to one-third of their time on direct supervision of probationers. Because of the weight of probation caseloads, which exceed a hundred probationers per officer, probation officers average less than one personal contact and one telephone contact each month with each probationer.[27] Such perfunctory contact, during a limited term of probation, is not comparable to the public school teachers' contact with school children for long hours over more than a decade of the students' lives. Probation officers barely have time to find out where their probationers are and whether they are having job problems; there is no time for teaching civics, or even for getting to know the probationer well enough to set an example.

Probation officers are functionaries. They do investigations, file reports, and make suggestions. They are not like police officers, the enforcers and embodiment of the ultimate power of the government over all citizens. Nor are they like teachers. Probation officers try to keep track of their probationers. They do not, like teachers, spend years instructing and molding the minds of the people under their control.

Probation officers differ from teachers and state troopers in another very significant way. They do not exercise their authority over the population at large, without intervening supervision by other vital members of the political community. By definition, the probation officer's clientele is

---

[27]U.S. Dept. of Justice, Nat'l Inst. of Law Enforcement and Criminal Justice, *Critical Issues in Adult Probation: Issues in Probation Management* (September 1979), at 88, 317-33.

limited to people whom the police, judges, and juries, in exercise of their intervening authority as governors of the citizenry, have screened and determined to be in need of custody and supervision. Thus the rightful authority of the state is exercised in the process of selecting who is to end up under the (usually perfunctory) supervision of a probation officer. Of course, then, the number of people subject to the authority of probation officers is also very small. Probation officers simply do not exercise authority over the population at large. The lives of the vast majority of Americans are never touched by the probation officer. Teachers and the police touch nearly everyone's life.

Finally, probation officers differ from state troopers and teachers because they are not traditional symbols of American government, values, and shared traditions. "The cop on the corner" and the "little red school house" are long-standing symbols of American life. However, American citizens probably have no clearer image of probation officers than they have of welfare clerks, court clerks, and myriad other government functionaries. The jobs performed by such people are of course important, but probation officers and other ministerial functionaries do not govern by exercising powers that go to the heart of our political institutions and do not stand as symbolic embodiments of the American way of life.

In summary, probation officers do not belong in the same class as state troopers and teachers for purposes of determining whether a state statute, which requires deputy probation officers to be citizens, can survive close judicial scrutiny under the Fourteenth Amendment. Because the County has not shown, and cannot show, that the requirement that probation officers be citizens is compelled by the state's interest in preserving its political community, the

only remaining issue is whether the County has shown that there is any other compelling basis for its discrimination against aliens.

3. There Is No Other Compelling Reason for Requiring Deputy Probation Officers, Who Do Not Fall Within the "Sugarman Exception," to Be Citizens.

The County offers no argument in support of the citizenship requirement, other than the desire to preserve its political community. That is understandable, as any other possible rationale would fall of its own weight.

This Court has already rejected arguments that citizenship is the only way to ensure the loyalty of employees; an oath of allegiance is adequate.[28] *In Re Griffiths, supra*, 413 U.S., at 726, n. 18.

Nor does there appear to be any rational relationship between citizenship and basic job qualifications, which can be, and are, better measured by educational requirements,[29] pre-employment testing,[30] and training.

The citizenship requirement is particularly irrational to the extent that it excludes from employment even persons

---

[28]All of the plaintiffs in this case have been willing to take an oath to support the State and Federal Constitutions. J.A. 41.

[29]California Government Code Section 1031(e) requires all peace officers to be high school graduates. Plaintiff Chavez-Salido has a B.A. degree from California State College at Long Beach. J.A. 19. Plaintiff Ybarra has an M.A. from the University of California at Los Angeles. J.A. 21. Plaintiff Bohorquez has a B.A. from the University of California at Los Angeles. J.A. 23.

[30]Chavez-Salido received a 95 on his pre-employmemt test for Deputy Probation Officer II, Spanish-speaking. J.A. 20. Ybarra received an 88 on the Deputy Probation Officer Trainee examination, and passed the Deputy Probation Officer II examination with a score of 70. J.A. 22. Bohorquez was informed at the end of the oral portion of his pre-employment examination that "despite his score on the oral interview" he could not be hired because he was not a citizen. J.A. 23-24. He was later informed by the County that he failed the oral interview and that it would be useless to appeal his score because he did not meet the citizenship requirement. J.A. 24.

who have applied for citizenship, such as plaintiff Chavez-Salido, who had a Petition for Naturalization pending when he was denied employment, and who is now a citizen. J.A. 21.

In fact, the citizenship requirement is counter-productive, and denies the state access to probation officer candidates who, because of their background, are exceptionally well qualified. For example, plaintiff Chavez-Salido applied for the position of Deputy Probation Officer II, Spanish-speaking. J.A. 19. As a native of Mexico (J.A. 19), he is a native Spanish-speaker. Thus he is especially well qualified[31] to be a Deputy Probation Officer, Spanish-speaking, since that position obviously would include supervising other native Spanish-speakers. The County's exclusion from its probation officer staff of native speakers of languages other than English is counter-productive in a state in which the need for Spanish-speaking probation officers is evidenced by the very existence of the jobs and in which it has been estimated that over 1.6 million people, with Spanish surnames, speak Spanish as a mother tongue, not English.[32]

The legislative history of Section 1031(a) offers no suggestion of any rationale for the citizenship requirement. In 1851 the California legislature first created the "peace officer" status for sheriffs, policemen, marshals, and constables.[33] None were required to be citizens. During the

---

[31]Chavez-Salido's other employment qualifications were excellent. Footnotes 29 and 30, *supra*.

[32]U.S. Bureau of the Census, Census of Population: 1970, Subject Reports PC (2)-1D, Persons of Spanish Surname, p. 7.

[33]One reason for the erratic expansion of the "peace officer" definition which has been suggested — successful lobbying by employees who wanted to be included in the definition in order to receive the generous fringe benefits given "peace officers" — of course provides no support for discrimination against aliens. *Hetherington v. State Personnel Bd.*, 82 Cal.App. 3d 582, 600, 147 Cal. Rptr. 300 (1978) (Reynoso, J., dissenting).

next one hundred and ten years, in dozens of subsequent enactments, the legislature added more positions to the "peace officer" list,[34] but did not require any to be citizens. J.A. 79. Then, as the three judge court noted below: "[I]n 1961, in one fell swoop, the legislature passed Government Code Section 1031 which applied the mandatory citizenship requirement to all of the positions on the list. We are cited no legislative history or legislative findings which supply any basis or rationale for this broad new citizenship requirement." J.A. 79-80. Nor could the California State Attorney General find any rationale in the legislative history for the citizenship requirement. The Attorney General stated in a 1970 Opinion, which indicated that Section 1031(a)'s citizenship requirement was unconstitutional: "[P]rior to 1961, there was no general requirement of citizenship to be a peace officer. We are aware of no change that occurred that would justify the change at that date." 53 Ops. Cal. Atty. Gen. 63, 68 (1970).

In short, because deputy probation officers do not fall within the *Sugarman* exception, the County could not and did not offer any other compelling basis to support the requirement that deputy probation officers be citizens.

C. Section 1031(a) Violates the Equal Protection Rights of Aliens Because Its Citizenship Requirement Is Not Precisely Crafted and Narrowly Written.

As argued above, Section 1031(a) is unconstitutional as applied to deputy probation officers. In addition, the statute is unconstitutional in relation to all "peace officer" posi-

---

[34]During the pendency of this action, the legislature has continued to make more changes in the list of peace officers. The list as of the date of the first opinion below (1977) can be found at J.A. 58-60, n. 22. Substantial additions, and a few deletions, were made by the legislature before the second opinion was written below in 1980. They are listed at J.A. 80-81, n. 6. The current list of jobs classified as "peace officers" in California appears at footnote 42, *infra*.

tions, because it does not comply with the requirement of *Sugarman v. Dougall, supra,* that statutes which discriminate against aliens in public employment be narrowly written and precisely crafted, in light of the state's acknowledged purpose, to apply only to positions for which citizenship is a constitutionally valid prerequisite.

This Court struck down a New York statute in *Sugarman* which required all employees in New York's competitive civil service class to be United States citizens. In reaching that conclusion, this Court did not analyze at all any of the job classifications in which the named plaintiffs sought employment. Instead this Court analyzed New York's total statutory and constitutional scheme for limiting certain public employment positions to citizens, and struck down that entire section of the code which prevented plaintiffs from obtaining employment. This Court invalidated that section not because the statute as applied to plaintiffs was unconstitutional, but because the full sweep of the statute was too extensive, both in its own terms, and when considered in conjunction with other provisions concerning employment of aliens.

This Court stated in *Sugarman* that state statutes which discriminate against aliens must be precisely drawn and narrowly written, even if the state's asserted purpose is to preserve its "political community" for citizens:

> "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.' *Dunn v. Blumstein,* 405 U.S. 330, 344 (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, *the means the State employs must be precisely drawn in light of*

> *the acknowledged purpose.*" *Sugarman v. Dougall, supra,* 413 U.S., at 642-43 (emphasis added).

See also Examining Board v. Flores de Otero, supra, 426 U.S., at 605, in which this Court stated that in evaluating classifications which discriminate against aliens "an inquiry must be made whether the means adopted are necessary and precisely drawn." *Accord Nyquist v. Mauclet, supra,* 432 U.S., at 7. *Foley v. Connelie, supra,* 435 U.S., at 296-97, n. 5:

> "This is not to say, of course, that a State may accomplish this end [restricting to U.S. citizens positions which involve discretionary decision-making, or execution of policy, which substantially affect members of the political community] with a citizenship restriction that 'sweeps indiscriminately,' *Dougall,* 413 U.S., at 643, without regard to the differences in the positions involved."

Therefore, regardless of the validity of Section 1031(a) as applied to deputy probation officers, the statute must still be declared unconstitutional if it is not precisely tailored to the state's legitimate interest. To this end, the state's statutory scheme must be subjected to "close judicial scrutiny." *Sugarman, supra,* 413 U.S., at 643.

To determine whether Section 1031(a) is precisely drawn in light of the state's interest in preserving its political community, *Sugarman* directs that Section 1031(a) and all other sections of California law which limit the employment opportunities of aliens be examined together, to determine whether the whole scheme is precisely tailored.

> "We thus have constitutional provisions and a number of statutes that, together, constitute New York's scheme for the exclusion of aliens from public employment. The present case concerns only § 53 of the Civil Service Law. The section's constitutionality,

> however, is to be judged in the context of the State's broad statutory framework and the justifications the State presents." *Sugarman, supra*, 413 U.S., at 640.

In *Sugarman* this Court found that New York Civil Service Law, Section 53 applied a citizenship requirement to "various positions in nearly the full range of work tasks, that is, all the way from the menial to the policy making." *Id.*, at 640. This Court also examined other New York statutory and constitutional provisions, which were not directly in issue in *Sugarman*, and noted that legislative appointees and employees, various officers appointed by the Governor, and teachers were not required to be citizens. Thus, New York's total statutory and constitutional scheme requiring public employees to be citizens was both overly inclusive and inexplicably underinclusive.

> "[T]he State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose. Our standard of review of statutes that treat aliens differently from citizens requires a greater degree of precision." *Sugarman, supra*, 413 U.S., at 642.

California's statutory scheme for limiting public employment to citizens is equally imprecise, in violation of the Fourteenth Amendment. Section 1031(a), the specific statutory section challenged here, applies to many job categories which are obviously not properly limited to citizens. In addition, many other sections of California law inappropriately require citizenship for a wide range of public jobs. At the same time, citizenship is not required for other public employment positions for which the requirement would arguably be permissible.

Beginning with an examination of Section 1031(a), that section requires all "peace officers" to be citizens. The more than seventy job categories which are defined as "peace officers" are listed in a series of sections of the California Penal Code. The "peace officers" category includes policemen, sheriffs,[35] and members of the State Highway Patrol,[36] as might be expected. Also included, obviously inappropriately, are voluntary fire wardens,[37] investigators of the Board of Dental Examiners,[38] local park rangers,[39] messengers in the Treasurer's office,[40] and employees of the Department of Parks and Recreation,[41] to name a few.[42] Thus the requirement of Section 1031(a) that "peace officers" be citizens is overly inclusive.

---

[35]Cal. Penal Code Section 830.1(a).
[36]Cal. Penal Code Section 830.2(a).
[37]Cal. Penal Code Section 830.3(c).
[38]Cal. Penal Code Section 830.3(b).
[39]Cal. Penal Code Section 830.31(b).
[40]Cal. Penal Code Section 830.4(d).
[41]Cal. Penal Code Section 830.2(h).
[42]The following is a list of all "peace officers" as presently defined: Sheriff; undersheriff; deputy sheriff; policeman; constable; marshal or deputy marshal of municipal court; and inspector employed by district attorney. Cal. Penal Code § 830.1(a). Members of California Highway Patrol, California State Police Division, California National Guard, University of California Police Department, California State University and College Police Department, Law Enforcement Liaison Unit of Department of Corrections, Wildlife Protection Branch of the Department of Fish and Game; and employees of Department of Parks and Recreation. Cal. Penal Code §§ 830.2(a)-(h). Certain employees of the Department of Alcoholic Beverage Control, Division of Investigation of the Department of Consumer Affairs; investigators of the Board of Medical Quality Assurance and of the Board of Dental Examiners; certain employees of the Department of Forestry; voluntary fire wardens; certain employees of the Department of Motor Vehicles and investigators of the California Horse Racing Board; the State Fire Marshal and assistant or deputy state fire marshals; certain inspectors of the Food and Drug Section; investigators of the Division of Labor Standards Enforcement and State Departments of Health Services, Social Services, Mental Health, Developmental Services, Alcohol and Drug Programs, and the Office of Statewide Health Planning and Development; marshals and police appointed by the Division of Parks and Recreation; the Chief

(footnote continued on following page)

Other state statutes, not directly in issue here, require that an even more bewildering array of jobs be reserved for citizens. For example, certain local "officers," including county license collectors, coroners, surveyors, veterinarians, fish and game wardens, librarians, health officers, administrative officers, and road commissioners, among others, must be U.S. citizens.[43] In addition, holders of certain "civil offices," which are filled by election or appointment, must be U.S. citizens.[44] These offices include three recording clerks of the Department of State; one clerk of the Superintendent of Public Instruction; certain port wardens and pilots; members of various State Boards, in-

---

and investigators of Bureau of Fraudulent Claims of Department of Insurance. Cal. Penal Code §§ 830.3(a)-(k). State, city, county and district arson investigators; local park rangers; community college police; welfare fraud and child support investigators; coroners and deputy coroners; San Francisco Bay Area Rapid Transit District Police Department members; county, city, or district harbor police; and municipal utility district security officers. Cal. Penal Code §§ 830.31(a)-(h). Security officers of California State Police Division; Sergeant at Arms of each house of the State legislature; bailiffs of the Supreme Court and courts of appeal; guards and messengers of Treasurer's office; state hospital officers; railroad policemen; school district security guards; Los Angeles County security officers; local housing authority patrol officers; local transit police officers; and city and county airport officers. Cal. Penal Code §§ 830.4(a)-(k). Parole, probation, and deputy probation officers; correctional officers; certain employees of the Departments of Corrections, Youth Authority, and Board of Prison Terms; employees having custody of wards in institutions operated by a probation department; and probation department transportation officers. Cal. Penal Code §§ 830.5(a) and (b). Persons deputized or appointed as a reserve or auxiliary sheriff, city policeman, deputy sheriff, reserve police officer of a regional park district, or deputy of the Department of Fish and Game. Cal. Penal Code § 830.6(a).

[43]California Government Code Section 24000 classifies the jobs listed above in the text as county officers. California Government Code Section 24001 then requires county or district officers to be registered voters. In turn, the California Constitution, Article II, Section 2 denies aliens the right to vote.

[44]California Government Code Section 1020 requires "civil officers" to be state citizens. In turn, California Government Code Sections 241 and 242 exclude aliens from state citizenships.

cluding the State Boards of Agriculture, Equalization and Education; and the State Supreme Court librarian.[45]

The state also requires citizenship of directors of District Agricultural Associations;[46] these associations hold fairs and expositions and operate and maintain cultural and recreational facilities.[47] The state requires members of the California Advisory Board of Home Furnishings to be citizens.[48] It also requires humane officers employed by humane societies to be citizens.[49]

As in *Sugarman*, the specific statute here challenged limits too many positions to citizens. In addition, as in *Sugarman*, the state has impermissibly limited many other positions to citizens, evidencing that the state has not carefully crafted its discriminatory statutes, as required by the Fourteenth Amendment, in the most precise manner possible. Finally, the state has not sought to limit some job categories, that do fall squarely within the political community, to citizens. As in *Sugarman*, no statute requires public school teachers to be citizens.[50]

Thus, Section 1031(a) violates the Fourteenth Amendment rights of aliens because the state has not precisely crafted and tailored the statute, and the rest of California's laws, to meet the state's legitimate, but very narrowly restricted, interest in preserving its political community. The

---

[45]Cal. Gov't Code §1001.
[46]Cal. Agr. Code § 3956.
[47]Cal. Agr. Code § 3951.
[48]Cal. Bus. & Prof. Code § 19035.2.
[49]Cal. Civ. Code § 607f.
[50]The absence of a citizenship requirement for teachers may be due to the fact that the State Attorney General, over ten years ago, opined that citizenship requirements for teachers, for peace officers as then defined by state law, and for many other government positions violated the Fourteenth Amendment. 53 Ops. Cal. Atty. Gen. 63 (1970).

County has not carried its burden of showing a compelling interest in the full and broad sweep of Section 1031(a)'s citizenship requirement.

D. Plaintiffs May Challenge the Excessive Reach of Section 1031(a).

The County challenges plaintiffs' "standing" to object to the overly broad and imprecise nature of the citizenship requirement of Section 1031(a). It asserts that plaintiffs may attack the citizenship requirement only as it applies to them as applicants for deputy probation officer positions.

The County misconstrues plaintiffs' position. Plaintiffs are not challenging Section 1031(a) for "overbreadth," in the sense that word is used to describe vague and broad statutes which restrict First Amendment rights. Plaintiffs are not asserting that Section 1031(a) is unconstitutional because it is vague, and may in the future be interpreted by the state in a way which would restrict other people's constitutional rights. Rather, plaintiffs' assertion that Section 1031(a)'s citizenship requirement applies to too many job classifications is simply a component of plaintiffs' equal protection analysis, a component which occurs in all cases attacking suspect classifications. As this Court noted in *Sugarman*, to sustain a suspect classification in the face of a Fourteenth Amendment challenge, the defendant must first show that there is a compelling governmental purpose in the discrimination and then must establish that the statute is also "precisely drawn in light of the acknowledged purpose." *Sugarman, supra*, 413 U.S., at 643. In all equal protection cases, defendants must show that the statute is

narrowly drawn to further the interests of the state.[51] Here plaintiffs attack a statute which provides that all peace officers must be citizens. The County must show a compelling interest in the discrimination and in addition must show that the statute is narrowly drawn to fulfill that interest. There really is no question of plaintiffs' "standing" to raise the issue of the statute's reach, as that issue is inherent in the equal protection challenge.

Thus, in *Sugarman*, this Court examined the full reach of the citizenship requirement imposed by the State of New York, and struck down the entire citizenship requirement. This Court did so without any analysis of the particular jobs the plaintiffs applied for and without any discussion of the "standing" of plaintiffs to assert as part of their equal protection challenge that the citizenship requirement was not precisely drawn.

The *Sugarman* approach — examining whether a suspect classification is precisely drawn, regardless of the application of the statute to plaintiffs — was recently employed by this Court in another challenge to an excessively broad alienage requirement for public employment. In *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), this Court struck down a federal civil service regulation requiring all civil service employees to be U.S. citizens. In *Hampton*, as in *Sugarman*, there is no discussion of the particular position to which the plaintiff sought appointment.

---

[51]*See also, Trimble v. Gordon*, 430 U.S. 762 (1977), in which this Court stated that statutes which discriminate against illegitimate children must be "carefully tuned" (*Id.*, at 772) to withstand an equal protection challenge. In *Trimble*, this Court held that a statute which provided that illegitimate children could inherit by intestate succession from their mothers, but not their fathers, violated equal protection because: "The reach of the statute extends well beyond the asserted purposes." *Id.*, at 772-73.

Whenever plaintiffs challenge a provision of law which is alleged to discriminate against a discrete and insular minority, plaintiffs need only meet the minimal requirements for standing of Article III of the Constitution of the United States. If they do, defendant must bear the burden of showing that the statute is narrowly drawn to fulfill the compelling governmental interest, regardless of whether the defendant could have fulfilled the governmental interest in a constitutionally acceptable way by drafting a more narrow and precise statute applicable only to individuals in the same position as plaintiffs.

Even if plaintiffs' relationship to Section 1031(a) is analyzed as an issue of standing, there is no question that plaintiffs do have standing. As this Court held in *Baker v. Carr*, 369 U.S. 186 (1962), the gist of the question of standing is whether the plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. . . ." *Id.*, at 204. There is no question that here plaintiffs have a personal stake. They sought jobs with the County as "peace officers," and were denied jobs because of Section 1031(a), which provides that all peace officers must be citizens. If plaintiffs prevail on the merits, they are entitled to jobs with the County if they still want them, and to collect their outstanding damage awards for back pay.

Therefore, the question is not whether there is a case or controversy, but instead whether there is some policy reason why it would be prudent to limit plaintiffs' challenge. As this Court noted recently in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the minimal Article III requirements for a "case or controversy" are simply that the "plaintiff must show that he personally has suffered

some actual or threatened injury as a result of the putatively illegal conduct of the defendant. [citations omitted]." *Id.*, 441 U.S., at 99. Any other requirement, which may be denominated as a standing requirement, is really a common sense, prudential limitation which a court may impose in order to ensure that cases which really should not be decided, are not. Prudential principles are used by the judiciary "to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Id.*, at 99-100.

The County, in its Opening Brief, cites *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) and *United States v. Raines*, 362 U.S. 17 (1960),[52] and argues that plaintiffs lack standing because they challenge the application of Section 1031(a) to other positions for which they did not apply, *i.e.*, because they seem to be asserting the rights of third parties. However, prudential considerations do not necessarily prevent parties from pointing out, in support of their case, the unconstitutionality of a challenged statute when applied to others:

> "Some statements might suggest a simple rule that a litigant lacks standing to assert the rights of others. Frequent instances in which courts have considered the impact of challenged conduct or their own decision on others, however, show that there is no simple rule; instead reasons must be sought for determining whether to consider the interests of nonparties. These reasons at times may lie in Article III, but often are drawn instead from concerns simply of good judicial policy.

---

[52]Since the *Sugarman* decision was issued on the same day as this Court's decision in *Broadrick* and more than a decade after *Raines*, the *Sugarman* approach to overly broad statutes, which are subject to Fourteenth Amendment equal protection challenges, is consistent with those two decisions and not limited in any way by them.

> Although the conclusion is commonly expressed in terms of 'standing,' finally, it must be noted that most of the decisions do not involve the right of the litigant to be in court. On the contrary, the question commonly arises in defining the extent of the issues that a court will decide at the behest of a party who is quite properly in court for some purposes." Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction § 3531, p. 205. (footnote omitted).

In this case, there are no compelling prudential reasons not to look at the entire sweep of Section 1031(a). It has been suggested that prudential limits should be imposed when there is a "best plaintiff" who might raise the issue in a better context than the plaintiff before the court.[53] However, it is hard to imagine who would be a better plaintiff. Perhaps an alien who sought a position as a messenger in the State Treasury Department or as a local fire warden could file suit, and arguably would present in some ways a more outrageous example of discrimination against aliens. However, there is no reason to believe that such a plaintiff would raise the issue of the excessive reach and imprecise nature of the alienage classification any more concretely or fully than do the plaintiffs before the Court.

On the other hand, there are good reasons not to impose prudential limits on plaintiffs' claim that Section 1031(a) is unconstitutional as applied to the full range of job classifications defined as "peace officers." If these plaintiffs are limited to challenging the statute only as applied to

---

[53]*See* Wright, Miller & Cooper, *Federal Practice and Procedure*, *supra*, at 212. However, in *Orr v. Orr*, 440 U.S. 268 (1979) this Court held that a state statute which provided that husbands could be made to pay alimony, but that wives could not, violated equal protection. In reaching that conclusion, this Court expressly rejected the wife's argument that the only proper plaintiff would be a husband who himself sought alimony, which her husband did not.

probation officers, then another alien who is denied employment with, for example, the Department of Parks and Recreation would have to file another suit and would also have to limit his suit to challenging the statute as applied to him. Then an alien denied employment as a local park ranger would have to file a separate suit, limited to the application of the citizenship requirement to local park rangers, etc. The filing of more than seventy separate individual suits, each challenging the same citizenship requirement in Section 1031(a) as applied to more than seventy different jobs, would be a useless waste of litigant and judicial time if Section 1031(a) is overbroad.

This Court has recognized that prudential limits on standing should not be imposed if the result is only to induce repetitive litigation. In *Craig v. Boren*, 429 U.S. 190 (1976) this Court permitted beer retailers to challenge a statute which allowed minor females, but not minor males, to buy beer; the retailers' claim was based on the ground that the statute discriminated against minor males. This Court addressed the merits of the suit, noting that to refuse to hear the case because of a prudential standing limitation "in order to await the initiation of a new challenge to the statute [by a minor male] would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence." *Id.*, at 194.

If Section 1031(a) is overbroad there is no point in avoiding the issue on the ground of standing. Plaintiffs have a direct stake in this case which satisfies the requirements of Article III. There are good prudential reasons for examining the entire scope of the citizenship requirement, consistent with *Sugarman*. There is no good reason not to do so.

III.
CONCLUSION.

The County has failed to carry its burden of showing that Section 1031(a) is supported by a compelling governmental interest in requiring all "peace officers," including deputy probation officers, to be citizens. Thus Section 1031(a) violates the Fourteenth Amendment rights of aliens to the equal protection of the laws.

For the reasons stated above, the order and judgment below should be affirmed.

Respectfully submitted,

MARY S. BURDICK,

Attorney for Appellees.

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS

No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer of the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICHARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Reply Brief for Clarence E. Cabell, et al., Appellants.

JOHN H. LARSON, County Counsel,
WILLIAM F. STEWART, Chief,
Labor Relations Division,
648 Hall of Administration,
500 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-1829,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

Page

Introduction 1

Argument 3

I.

Section 1031(a) as Applied to the Class of Probation Officers Is Constitutional as These Governmental Employees Fall Within the Sugarman Exception . 3

A. The Strict Scrutiny Standard Is Not Applicable 3

B. The Duties and Responsibilities of Probation Officers, Consistent With the Foley and Ambach Criteria, Fall Within the Sugarman Definition of Political Community 6

II.

California's Statutory Method of Imposing Citizenship Requirements on Peace Officers Is Not Unconstitutionally Overbroad 11

A. Peace Officers With Powers of Arrest Are Properly Included Within the States' Political Community 11

B. There Are Compelling Prudential Reasons to Limit the Appellees' Challenge to §1031(a), as It Is Applied to Probation Officers 14

III.

The Case Should Not Be Remanded, the Record Being Clearly Adequate for Constitutional Analysis 16

TABLE OF AUTHORITIES

Cases	Page
Ambach v. Norwich (1979) 99 S.Ct. 1589 ..... 2, 3, 4, 5, 6, 14, 15,	17
Burkes v. Callion, 433 F.2d 318 (1970)	6, 7
Foley v. Connelie, 419 F.Supp. 889 (1976)	18
Foley v. Connelie, 98 S.Ct. 1071	16, 17
Folie v. Connelie, 435 U.S. 291 (1978) 2, 3, 4, 5, 6, 11, 12,	15
Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756 (1973)	10
Greene v. Michigan Department of Corrections, 315 F.2d 546 (1963)	7
Sugarman v. Dougall, 413 U.S. 634 (1973) 2, 3, 4, 5, 6, 8, 11, 12, 15, 16, 17,	18
United States of America v. Consuelo-Gonzalez, 521 F.2d 259 (1975)	7, 8
United States v. Glasgow, 389 F.Supp. 217 (1975) ...	9
United States of America v. Tyler, 605 F.2d 851 (1979)	6, 7

Statutes

Page

Government Code, Sec. 830 et seq. 14
Government Code, Sec. 830.3 12
Government Code, Sec. 830.31 12
Government Code, Sec. 830.31(b) 12
Government Code, Sec. 832 13
Government Code, Sec. 832(c) 13
Government Code, Sec. 836 13
Government Code, Sec. 1031 14
Government Code, Sec. 1031(a) 3, 12, 14
United States Code, Title 42, Sec. 1983(2) 6

Textbook

The ABA Standards Relating to the Administration of Criminal Justice, Compilation (1974), p. 386, note 11 9

No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in his official capacity as Personnel Officer of the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICHARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

Reply Brief for
Clarence E. Cabell, et al., Appellants.

INTRODUCTION.

In this reply brief, the Appellants respond to the following contentions and issues raised in the briefs of the Appellees and their amici.

1. Whether requiring Probation Officers to be citizens is unconstitutional.

2. Whether the challenged statutory scheme is unconstitutionally overbroad.

3. Whether the District Court Judgment should be vacated and remanded for the taking of further evidence on the duties of Probation Officers.

Regrettably, the Appellees in an attempt to paint California with the broad brush of institutional bigotry, at the outset of their brief lapse into the unfortunate and irrelevant practice of engaging in an ad hominem form of argument by referring to far earlier, and admittedly lamentable, cases involving restrictions against aliens. In truth, today there are extremely few restrictions on the employment or other rights of aliens in this country. None exist in private sector employment and it is only in certain narrow areas of governmental employment as recognized by this Court in *Sugarman, Foley* and *Ambach* that citizenship restrictions are applied.

The initial issue in this case is whether within the criteria of those cases a citizenship requirement for a probation officer is constitutionally permissible. If such a requirement is valid, the inquiry then turns to whether the statutory scheme implementing the requirement is unconstitutionally overbroad.

Also, largely irrelevant, is the technical competence of a particular individual to perform the job. It is recognized that a citizenship requirement in very large measure is directed toward the affirmation of allegiance to the country the individual seeks to serve as a condition for participating in the performance of important governmental functions.[1] The ability to speak Spanish may be an extremely desirable qualification for a probation officer in California, but there are literally millions of Spanish-speaking citizens that can also perform that task.

---

[1] "The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. . . . The form of this association is important: An oath of allegiance or similar ceremony cannot substitute for the unequivocal legal bond citizenship represents." *Ambach v. Norwich*, (1979) 99 S.Ct. 1589 at 1594.

ARGUMENT.

I.

SECTION 1031(a) AS APPLIED TO THE CLASS OF PROBATION OFFICERS IS CONSTITUTIONAL AS THESE GOVERNMENTAL EMPLOYEES FALL WITHIN THE *SUGARMAN* EXCEPTION.

A. The Strict Scrutiny Standard Is Not Applicable.

The Court in *Sugarman v. Dougall*, 413 U.S. 634, 617 (1973), in broad terms stated that citizenship may be reserved for officers who participate directly in the formulation, execution, or review of broad public policy functions that go to the heart of representative government. It is clear from the subsequent decisions of the Court in *Foley* and *Ambach* that this language was not construed as restricting citizenship to the highest executive levels of government. The arguments made by the Appellees as to why probation officers as a class do not perform duties within the ambit of *Sugarman* echo those rejected by the Court in *Foley* and *Ambach*.

It is clear that *Sugarman* and the subsequent *Foley* and *Ambach* decisions establish the doctrine that there are limitations to the application of the strict scrutiny doctrine when the government seeks to impose citizenship requirements on its public employees. It is true that aliens are recognized to be a protected minority or insular group to which restrictions must be viewed in general under the strict scrutiny doctrine. However, the mere fact of alienage does not do away with all attributes of citizenship. The Appellants urge that when measured by the full scope of the probation officer's function and role in government, in the criminal justice system, and in society, the *Sugarman* criteria as applied by this Court in *Foley* and *Ambach* to police officers and teachers clearly sustain a citizenship requirement for probation officers.

The Appellees advance a theory that in determining whether a particular governmental job is part of the "political community" for citizenship purposes, the Court should first apply the strict scrutiny standard. Only if the job classification in question passes that hurdle they contend, will the rational basis standard be applied to the issue of whether the citizenship requirement is related to the duties of the position. Although the Appellants believe in light of the *Foley* and *Ambach* decisions that a citizenship requirement for probation officer would clearly meet constitutional muster even under such a strict scrutiny test, the suggestion of the Appellees is contrary to the standards articulated by this Court and are an invitation to reverse the essential holdings in *Foley* and *Ambach* with regard to citizenship and governmental employment. It is nothing more than an argument to apply the strict scrutiny standard even to public employment.

It appears clear from this Court's decisions in *Foley* and *Ambach* that it did not impose a strict scrutiny standard in the initial determination of whether the occupation in question was part of the "political community". Prior to that in *Sugarman v. Dougall*, 413 U.S. 634 (1973), the Court observed that it would be inappropriate to require every statutory exclusion of aliens to meet the strict scrutiny test. "Our scrutiny will not be so demanding where we deal with matters firmly within a state's constitutional prerogatives." *Sugarman v. Dougall. Id.*, at 648. Moreover, "[W]e recognize too, the State's broad power to define its political community". *Id.*, at 643. Then in *Foley* the Court held that "The state need only justify its classification by showing of some rational relationship between the interest sought to be protected and the limiting classification." *Foley v. Connelie*, (1978) 435 U.S. 291 at 296.

This Court in recent years, in citizenship cases, has recognized a distinction between private and public employment. Perhaps it is because government employment by its

very nature performs services on behalf of the public at large and that a great number of employment activities significantly impact upon the rights of citizens, that the courts have recognized this distinction. Moreover, the application to a narrow segment of government employment does not strike at the noncitizen's ability to exist in the community. From *Sugarman* through *Foley* to *Ambach*, this Court has clearly stated that a standard less than strict scrutiny is applicable to the government's imposition of a citizenship requirement on their employees.

"It would be inappropriate, however, to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny', because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship' . . ." *Foley v. Connelie, supra* at 295.

The less stringent standard was again restated in *Ambach v. Norwich*, 99 S.Ct. 1589 (1979).

"The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court." *Ambach v. Norwich, supra*, at 1593.

"The distinction between citizens and aliens though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." *Id.* at 1593-94.

While the determination of whether a particular governmental job is of such a nature to be within the political community is not one susceptible of clear-cut distinctions and well defined parameters, it appears clear that by applying the standards of review followed in *Foley* and *Ambach* and by measuring the duties of the probation officer against the duties of police officers and teachers that the Appellants herein have shown that a citizenship requirement may be validly applied to the position of deputy probation officer. No standard of review should be applicable to this case different than that followed in *Sugarman, Foley* and *Ambach*.

B. The Duties and Responsibilities of Probation Officers, Consistent With the *Foley* and *Ambach* Criteria, Fall Within the *Sugarman* Definition of Political Community.

The Appellees' attempted distinction, utilizing such terms as "ministerial" and "functionary", of the duties of a probation officer and those of police officers and teachers is not persuasive. Their points, conclusionary and lacking substance, ignore the essential core role, vastly discretionary, played by probation officers in the nation's criminal justice system. Recognizing that a police officer may be required to be a citizen, the Appellees have failed to advance a single viable reason why the probation officer's role is so different and less significant than that of the other citizen participants in the criminal justice system, i.e., prosecutor, police, judge, and juror, that citizenship constitutionally cannot be required.

The statutory responsibilities imposed upon probation officers exceed by far those of police officers and school teachers. A probation officer's job is so uniquely governmental that it finds no counterpart in the private sector and cannot by any stretch of the imagination be considered one of the common occupations of the community.

This Court and the Circuit Courts on numerous occasions have emphasized the probation officer's role as an arm of the court, in representing the interests of society by exercising discretionary power directly impacting on an individual's rights and liberties, and their authority to act in a quasi-judicial capacity. Indeed, the failure of a probation officer to properly carry out his duties has been held to deny a probationer his due process.[2]

The Ninth Circuit in *Burkes v. Callion*, 433 F.2d 318 (1970), a civil rights action brought under 42 USC § 1983(2)

---

[2]*United States v. Tyler*, 605 F.2d 851 (1979).

against a Los Angeles County Deputy Probation Officer for allegedly making false statements of fact in his probation report, ruled (at page 319) that "a probation officer preparing and submitting a probation report in a criminal case is performing a quasi-judicial function and is entitled to a similar, if not the same, immunity that is accorded to judges for acts done by them in the exercise of their judicial functions." The immunity granted probation officers in performing their functions and exercising their discretion makes their role even more fundamental and critical in the relationship between the government and its citizenry.

In *United States of America v. Tyler*, 605 F.2d 851, at 853 (1979), the Fifth Circuit, noting the discretionary authority of a probation officer, overturned the probation officer's revocation of parole for failure to exercise reasonable diligence stating "nor do we suggest that a revocation proceeding should be initiated as a reflexive reaction to any technical or minor violation of the terms of probation. The probationary system, however, imposes a duty on a probation officer to represent the interests of both society and probationer." The Sixth Circuit in *Greene v. Michigan Department of Corrections*, 315 F.2d 546 (1963), has held that the failure of a probation officer to exercise reasonable diligence to revoke parole when there has been a violation committed may result in a waiver of the violation and loss of jurisdiction.

The authority of probation officers, beyond even that of police officers, to interfere with the fundamental liberties of other citizens was observed by the Ninth Circuit in *United States of America v. Consuelo-Gonzalez*, 521 F.2d 259 (1975). In this case the court held invalid a search of a person's home conducted by police pursuant to a federal probation condition that the defendant submit to a search of her person or home at any time when requested by law enforcement officers. In so ruling, however, the court specifically distinguished between searches by police officers

and those by probation officers. If the search had been made by a probation officer the court concluded it would have been legal.

The extensive authority of probation officers to interfere with the liberties of citizens was underscored by the Circuit Court when it ruled that a probation officer need not have probable cause nor obtain a warrant prior to the search of a probationer. The majority noted

> "*Probation authorities also have a special and unique interest in invading the privacy of probationers. This special and unique interest is not extended to law enforcement officers generally*. To interpret the Federal Probation Act in such an expansive manner would not be reasonably related to the Act's purposes. For this reason we interpret the act to require that searches of probationers not otherwise in compliance with the usual standards of the Fourth Amendment be by or under the immediate and personal supervision of, probation officers." . . . (Emphasis added)
>
> "Moreover, a thorough search of a probationer's residence incident to, or following, a probation visit is not dependent upon the establishment of probable cause. A reasonable belief on the part of the probation officer that such a search is necessary to perform properly his duties is sufficient. As we said *Latta vs. Fitzharris*, this belief may be based on a 'hunch' having its origin in what the probation officer has learned or observed about the behavior and attitude of the probationer." *United States v. Consuelo-Gonzalez*, 521 F.2d 259 at 266.

This broad grant of authority beyond that afforded ordinary police officers, coupled with the probation officer's immunity when acting in a *quasi judicial* capacity, manifestly establishes the probation officer's fundamental role in the execution of broad public policy sufficient to comply with the *Sugarman* criteria.

The Appellees' contentions that the duties of a probation officer are narrow in focus and impact only upon a small group of individuals is misplaced. The probation officer's function is directed toward the larger constituency of the general community and society.

> "There can be little doubt that probation constitutes a form of 'corrective and preventive guidance designed to protect the public by correcting the anti-social tendencies' of offenders and thus is treatment as defined in 18 U.S.C. §5006(g). The basic purpose of probation is to 'provide an individual program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for this original offense in the event he abuses this opportunity.'" *United States v. Glasgow*, 389 F.Supp. 217, at 222 (1975)

The court in *Glasgow* quoted with approval the observations of the American Bar Association in its recently adopted standards on probation. "Probation is an affirmative correction tool, a tool which is used not only because it is of maximum benefit to the defendant (though, of course, this is an important side product), but because it is of maximum benefit to the society which is sought to be served by the sentencing of criminals." *United States v. Glasgow*, *supra* at 222. The ABA Standards Relating to the Administration of Criminal Justice, Compilation (1974), p. 386, Note 11, states, "The deterrent and rehabilitative effects of probation are deemed by the ABA to be so substantial, when probation is administered under a system which is adequately funded and sufficiently manned by skilled personnel, as to render probation the preferred disposition in all criminal cases, to be imposed 'unless particular aggravating facts emerge in the case at hand.' "

This Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973) noted the discretion and skill necessarily exercised by probation officers in the parole revocation process — a process, of course, which directly affects the liberty of the probationer. The probation officer must first determine if the parolee has violated a condition of parole and secondly, if he did, should he be recommitted to prison or should other rehabilitative steps be taken. The Court observed that a parole violation does not necessarily or automatically result in a revocation of parole. The result to a very great extent depends upon the judgmental evaluation of the probation officer.[3]

The Appellees have failed to address the important, if not predominate, role that probation officers play in the juvenile justice system. In California, as the multiple statutory provisions demonstrate (see citations in Appellant's opening brief, pages 50-19), the role of the probation officer is extensive and pervasive. Most significantly, the probation officer plays a vital role in the initial determination of whether the juvenile is diverted from the criminal justice

---

[3]The Court in footnote 8 at 411 U.S. 784, observed the criticality in the parole revocation process of the professional evaluation by the probation officer.

> "The factors entering into these decisions relate in major part to a professional evaluation, by trained probation or parole officers, as to the overall social readjustment of the offender in the community, and include consideration of such variables as the offender's relationship toward his family, his attitude toward the fulfillment of financial obligations, the extent of his cooperation with the probation or parole officer assigned to his case, his personal associations, and — of course — whether there have been specific and significant violations of the conditions of the probation or parole. The importance of these considerations, some factual and others entirely judgmental, is illustrated by a Wisconsin empirical study which disclosed that, in the sample studied, probation or parole was revoked in only 34.5% of the cases in which the probationer or parolee violated the terms of his release. S. Hunt, The Revocation Decision: A Study of Probation and Parole Agents' Discretion 10 (unpublished thesis on file at the library of the University of Wisconsin 1964), cited in Brief for Petitioner, Addendum 106."

system. How the probation officer relates with the juvenile offender is critical, even more so than with adults, because juveniles are in their formative years. In summary, if probation officers did nothing but perform their statutory duties with regard to juveniles that in itself is sufficient to make them a part of the political community within the ambit of the *Sugarman* exception.

The fact that the probation officer does not come in contact with vast numbers of the public in conducting his daily activities does not militate against their being members of the political community. As the courts and the American Bar Association have observed, the role of the probation officer extends beyond his immediate contact with the probationer to directly relate to the welfare of society. Personal contacts with the probationer is only one facet of the probation officer's multiple responsibilities. It also encompasses investigations and reports, and making evaluations and recommendations to the Court — recommendations which are pivotal as to the disposition of the offender. The great increase of crime in recent years[4] makes probation and probation officers an even more important element in the criminal justice system. The fact there are increased caseloads and less funds for hiring more probation officers does not detract from their fundamental role or the importance of their activities.

II.

CALIFORNIA'S STATUTORY METHOD OF IMPOSING CITIZENSHIP REQUIREMENTS ON PEACE OFFICERS IS NOT UNCONSTITUTIONALLY OVERBROAD.

A. Peace Officers With Powers of Arrest Are Properly Included Within the States' Political Community.

Although California's statutory citizenship requirements do not neatly fall into either the *Sugarman* or *Foley* factual context, the statutory provision is sufficiently definitive and

---

[4]Amicus SEIU (Brief, page 3, note 4) notes that the number of felony arrests increased from 170,980 in 1979 to 189,303 one year later. Those receiving either probation or probation with jail correspondingly swelled from 22,425 to 24,767.

narrow to withstand constitutional challenge. Unlike the challenged statute in *Sugarman* which applied a citizenship requirement to all civil servants, California's statutory approach pertains only to those designated as possessing peace officer status, a very narrow but significant public position of trust and authority.

Although the categories enumerated approximate 70, most perform the same peace officer functions but for different jurisdictions or entities within the state. Thus, the statutes are subdivided into deputy sheriffs, city police, members of the highway patrol, state employees whose primary duty is law enforcement (Govt. Code § 830.3), members of a state or local agency whose primary duty is law enforcement (Govt. Code § 830.31) and probation officers. The number of public occupations limited to citizens under the peace officer category is extremely narrow compared with the thousands affected in the *Sugarman* case.

As this Court has observed, the state has the broad power to define those governmental occupations which form a part of their political community. California has done so with regard to peace officers and a review of those duties of those peace officers in light of *Foley* supports the citizenship requirement imposed. All the incumbants of the peace officer categories affected by Section 1031(a) have the authority to make an arrest upon probable cause and may carry weapons in the performance of their duty if authorized by their employing agency. For example, Government Code Section 830.31 describes as peace officers various persons who, as members of a state or local agency, have a primary duty of law enforcement. Included in that category are park rangers.[5] These persons, including the park rangers, are provided under California law with authority extending to

---

[5]California Government Code Section 830.31(b). This section provides that it is only applicable to park rangers that have a primary duty of property protection and the keeping of the peace.

any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 as to any public offense with respect to which there is an immediate danger to person or property.

California Government Code Section 832 provides that every person designated a peace officer shall receive a course of training in the exercise of his powers of arrest and in the carrying and use of firearms. The courses must meet minimum standards prescribed by the Commission on Peace Officers Standards and Training (POST). If the persons do not satisfactorily complete the course, they are stripped of the powers of a peace officer until such is accomplished (Government Code Section 832(c)).

The individuals enumerated in California's Peace status subject to a citizenship qualification have a primary duty of law enforcement in their particular jurisdiction with the concomitant power of arrest. Thus, they clearly exercise one of the most important sovereign powers of the state—the power to restrain the liberty of its citizens. To the public they represent and symbolize the state's authority and power to execute its policy, be it with regard to motor vehicle operation or the maintenance of peace in its parks. In light of the state's broad authority to define the members of its political community, the designation of peace officer in the categories in question, cloaked with the power to make arrests and with other attributes of law enforcement, is not unconstitutionally restricted to citizens.

There are extremely few classifications of peace officer within California's statutory scheme that might be suspect with regard to citizenship. The District Court below only considered evidence on the particular duties of probation officers and therefore had no basis to assume that many of the enumerated categories did not form a part of the political community. In view of the lower court's conclusion that a probation officer was not part of the political community, the court never had reason to consider, on a position by

position basis in accordance with the guidance of this Court, the other categories enumerated in the statutory scheme.

As a practical matter, the appellants urge there is no difference for constitutional purposes between the California statutory scheme of referencing peace officer citizenship requirements to one statute, and that of providing in each statutory category of peace officer a proviso that citizenship was required. The overbreadth argument could not be raised if all the subdivisions of Government Code Section 830, *et seq.*, pertaining to peace officer positions each specified a citizenship qualification.

The fact that within the peace officer category, the duties may vary among positions, does not make the basic statutory approach unconstitutional. The situation is not unlike that involving public school teachers in *Ambach*. The argument was made in that case that the statute requiring all public school teachers to be citizens was unconstitutionally overbroad because it encompassed all teachers regardless of the subject taught, be it history, civics, or machine shop. The Court found this argument unpersuasive. Because the arguable California peace officer classifications are so few in number and require further specific fact findings in accordance with this Court's direction to examine each challenged position on a case by case basis, the instant case is an inappropriate one for declaring §1031 unconstitutionally overbroad. The decision should be restricted to the occupation sought by appellees — deputy probation officers — and the evidence overwhelmingly sustains a citizenship requirement for this significant public official.

B. There Are Compelling Prudential Reasons to Limit the Appellees' Challenge to §1031(a), As It Is Applied to Probation Officers.

Initially it should be observed that there will result no prejudice to the plaintiffs if the Court declines to strike down California's entire statutory scheme if the probation officer

position they sought may be legitimately restricted to citizens. In view of the Court's earlier rulings in *Foley* and *Ambach*, and the manifest duties and responsibilities of probation officers as governmental employees, it appears that such a restriction is clearly constitutional.

The appellees have identified certain peace officer positions they suggest cannot be restricted to citizens, e.g., park rangers, fire wardens and guards and messengers in the Treasurer's office. The record, however, does not reflect the specific nature of the duties of these positions nor did the trial court make any finding of fact or even consider, taking their public responsibilities as a whole, whether they were part of the political community. It is apparent, however, that the holders of these positions have been entrusted with the power of the state to make arrests on behalf of its citizens. Thus, the circumstances are quite unlike that in *Sugarman* where the statute embraced all conceivable classifications that happened to be designated as civil servants and was not limited to a specific generic class such as teachers and peace officers. Factually, the case at bar is far more akin to *Foley* and *Ambach* than to *Sugarman*.

Because all incumbents of the enumerated positions possess peace officer status, including the power of arrest, we believe that under *Foley* they can be restricted to citizens because they exercise a fundamental attribute of state sovereignty. It cannot be said that these California peace officers have little or no relationship with legitimate state interests when they have been granted the authority to make arrests on probable cause, seize property, carry weapons, and represent the police power of government. It would thus be improper to strike down under the theory of being constitutionally overbroad the entire statutory scheme based upon an unproved and untried assertion that the statute possibly embraces some few job categories that cannot be restricted to citizens.

Even if there are such inappropriate classifications encompassed by the statute there are very few and should be determined only after trial on the merits as a result of a challenge by an interested party with standing. The Court in *Foley v. Connelie*, 98 S.Ct. at 1071 admonished that the Court must examine on a case by case basis each governmental position at issue. With the exception of probation officers, the lower court did not do so in this case.

The appellees' contention regarding multiple litigation to test the validity of the citizenship requirement for each category of peace officer is without merit because the same situation would exist if a citizenship qualification was included in each of the statutory subsections defining the public occupations accorded peace officer status. The fact that California statutory scheme does it by reference to one separate statute does not make it constitutionally defective.

California has entrusted its peace officers with fundamental attributes of state sovereignty. The state, in exercising its broad powers to define its political community, has specified that they shall be citizens if they are to exercise that public trust and responsibility. This Court has shown a reluctance to strike down state laws particularly when legitimate state concerns are affected and a limiting construction can be made. The *Sugarman* case should be restricted to its particular facts. The Plaintiffs in that case were clearly not in positions that could reasonably be construed as forming part of the political community (clerk typist, staff technician, and an administrative assistant). Applying the overbreadth doctrine to citizenship requirements should be limited to circumstances far more embracing in scope and defective in application than that present herein.

III.

THE CASE SHOULD NOT BE REMANDED, THE RECORD BEING CLEARLY ADEQUATE FOR CONSTITUTIONAL ANALYSIS.

The Amicus Curiae, National Center for Immigrants' Rights, suggest that the record on the duties of probation officers is inadequate to permit the Court to determine the

constitutional issue (Brief, p. 5). This contention is not well taken in view of the review two times by the trial court based on stipulated facts and an extensive statutory background defining the duties of the position.

This Court and others are more familiar with the duties, function and role of probation officers, than any other form of occupation with the exception of judicial officers and attorneys. The California statutory framework establishing and defining the duties of probation officers is quite extensive and is abundantly reflected in the record. The Court, of course, can take judicial notice of the duties of probation officers imposed by statute or required by the courts.

It is clear that there is no benefit to be gained by further delay in remanding the case to flesh out the record when the duties of the job in question could not be more clear or extensively documented. It is noteworthy that the appellees themselves have not requested a remand or assert that the record is insufficient to address the constitutional question. Moreover, they did not appeal from the trial court's denial of further discovery nor intimate it was prejudicial.

The appellees or their amici do not take the position that the duties of a probation officer in California vary in any significant degree from those performed by probation officers in other states or in the federal system. The amicus union, (SEIU, Local 535) representing *inter alia*, probation officers, has noted that "parole officers" duties are essentially the same throughout the state and the federal system" (Brief, p. 4). No one disputes this.

The trial court, fully cognizant of the extensive statutory duties performed by probation officers, was of the opinion, even in the face of this Court's decision in *Foley* and *Ambach*, that the public occupation did not justify a citizenship restriction. This, of course, the appellants dispute but the issue herein has never been over what the probation officer does, but whether in doing it, is the officer acting as part of the political community within the context of the *Sug-*

arman exception. The appellees themselves do not challenge the nature of a probation officer's functions or suggest how an augmented factual record is essential to the resolution of the constitutional issues. Rather, the thrust of their argument is that assuming the probation officers do what the statutes and the courts require them to do, their role, nevertheless, is so relatively unimportant in the relationship between the government and the citizens that probation officers are not within the "political community" that properly may be restricted to citizens. The present record is more than adequate for resolution of the Constitutional issues.[6] Appeal has been granted twice by this Court and there is absolutely no justification for further delaying the ultimate resolution of this matter.

Respectfully submitted,

JOHN H. LARSON, County Counsel,
By WILLIAM F. STEWART, Chief,
Labor Relations Division,
Attorneys for Appellants.

---

[6]The *Foley* case, of course, was submitted to the District Court based on a record of the pleadings. There appeared to be stipulation of facts in that case. See *Foley v. Connelie*, (1976) 419 F.Supp. 889, N. 1 at 891.

Office-Supreme Court, U.S.
FILED
AUG 3 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASEN-STAB, in her official capacity as Personnel Officer of the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic;

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal from the United States District Court for the Central District of California

---

Amicus Curiae Brief in Support of Respondents

/ / /

NO. 80-990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer of the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic;

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal from the United States District Court for the Central District of California

---

Amicus Curiae Brief in Support of Respondents

///

PETER A. SCHEY*
TIMOTHY S. BARKER
CARLOS HOLGUIN
NATIONAL CENTER FOR IMMIGRANTS' RIGHTS
1550 West 8th Street
Los Angeles, California 90017
Telephone: (213) 487-2531

AMIT PANDYA
NATIONAL CENTER FOR IMMIGRANTS' RIGHTS
1511 K Street, N.W., Suite 931
Washington, D.C. 20005
Telephone: (202) 737-1444

FRED OKRAND
AMERICAN CIVIL LIBERTIES UNION OF
SOUTHERN CALIFORNIA
633 S. Shatto Place
Los Angeles, California 90005
Telephone: (213) 487-1720

ANTONIO RODRIGUEZ
LOS ANGELES CENTER FOR LAW AND JUSTICE
2111 1/2 Brooklyn Avenue
Los Angeles, California 90033
Telephone: (213) 266-2690

MARY K. GILLESPIE
CALIFORNIA RURAL LEGAL ASSISTANCE
2111 Mission Street, Suite 401
San Francisco, California 94110
Telephone: (415) 864-3405

Counsel for Amicus Curiae

*Counsel of Record

TABLE OF CONTENTS

	PAGE
Table of authorities	iii
I. INTEREST OF AMICUS CURIAE . . .	1
II. SUMMARY OF ARGUMENT	2
III. ARGUMENT..	5
(1) The District Court Judgment Should Be Vacated and Remanded . . .	5
(2) The Challenged California Statutory Scheme Sweeps Too Broadly	11
(a) History of California Discrimination Against Immigrant Communities. .	12
(b) The District Court Properly Considered Appellees Challenge to Government Code Section 1031, As Applied to All "Peace officers"	16

Table of Contents (Cont.) PAGE

(i) Scope of Review of the Challenged Statute. 16

(ii) The Challenged Statute Unjustifiably Precludes Non-Citizens Employment in Many Job Classifications. 22

(iii) The Challenged Statute as Applied to Deputy Probation Officers . . . 30

IV. CONCLUSION 34

INDEX OF AUTHORITIES

Cases — Page

Ambach v. Norwick, 441 U.S. 68 (1979)...passim

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 20

Baker v. Carr, 369 U.S. 186 (1962).....18

Barrows v. Jackson, 346 U.S. 249 (1953)..20,21

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 17,18

Chavez-Salido v. Cabell, 427 F.Supp. 158 (C.D. Cal. 1977) 3,8,22

Chavez-Salido v. Cabell, Case No. 76-541-IH (C.D. Cal. June 4, 1980) 3,8

Coopers and Lybrand v. Livesay, 437 U.S. 643 (1978) 10

Czaplicki the Hoegh Silvercloud, 351 U.S. 525 (1956) 11

Foley v. Connelie, 435 U.S. 291 (1978)..passim

Graham v. Richardson, 403 U.S. 365 (1971)...34

Henry v. Mississippi, 379 U.S. 443 (1964)...11

In re Griffiths, 413 U.S. 717 (1973) 29

Lin Sing v. Washburn, 20 Cal. 534 (1862) ...13

Mayer v. City of Chicago, 404 U.S. 189 (1971) 10

People v. Hall, 4 Cal. 399 (1885) 15

People v. Hutson, 221 Cal.App.2d 751 (1963) 31

People v. Journey, 129 Cal. Rptr. 478 (1976) 31

Protective Committee for Independent Stockholders of T.M.T. Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968) ...11

Sugarman v. Dougall, 413 U.S. 634 (1973) 11,12,16,17,18,19,29

Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) 14

Truit Payne Co., Inc., v. Chrysler Motors Corp., ___ U.S. ___, 49 U.S.L.W. 4516 (May 18, 1981) 10

United States v. Raines, 362 U.S. 17 (1960) 17,20,21

Whitcombe v. Yolo County, 141 Cal.Rptr. 189 (1977) 31

Yick Wo v. Hopkins, 118 U.S. 356 (1886) ...14

CONSTITUTIONS AND STATUTES

Constitution of the United States, Article III 18

California Constitution, Article XIX Section 2 (1879) 12,13

California Fish and Game Code, Section 990 (1945) 14

California Government Code, Section 1031(a) .....passim

California Penal Code, Section 179 (1880)..13

California Penal Code, Section 830 26

California Penal Code, Section 1203 30,31

California Penal Code, Section 1203.10 31

California Statutes 1945, c.181 14

Law of April 26, 1862 (California) 13

OTHER SOURCES

Annual Report of the Immigration and Naturalization Service (1979) 6

California State Personnel Board, Specification, Toll Sergeant, Schematic Code C540, Revised January 9, 1959 24

California State Personel Board, Classification, Schematic Code VJ25, Revised March 26, 1975 26,27

California State Personnel Board, Specification, Schematic Code Vw10, Revised December 7, 1972 25,26

Correctional System Study of Board of Corrections: Probation, California Board of Corrections (July 1971) 32,33

Los Angeles County Probation Department Union Fact Sheet (June 1981) 32

Maloney and Raymond, "A Standardized Pre-sentence Report", Fed.Prob. 41:2 (June 1977) 31

Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction Section 3531 19

I.

INTEREST OF AMICUS CURIAE[1/]

Amicus curiae have obtained the consent of the appellants and appellees for the filing of this brief. Amicus curiae the League of United Latin American Citizens (LULAC) is the largest and oldest Hispanic civil rights organization in the United States. LULAC has chapters and members located throughout the United States, including California. Many members of LULAC are lawful permanent immigrants residing in California who will be immediately affected by the outcome of this case. Amicus curiae the Farm Labor Organizing Committee (FLOC) will be affected by the

---

1/ Pursuant to Rule 36.5, Rules of the Supreme Court of the United States, amicus curiae will only set forth the interest of amici, summary of the argument, the argument and a conclusion.

by the outcome of this case. Amicus curiae the Farm Labor Organizing Committee (FLOC) is a farm-worker union which organizes workers regardless of their alienage or immigration status. Members of FLOC will be affected by the outcome of this case. Amicus curiae the Social Justice Commission (Archdiocese of San Francisco) provides services and assistance to lawful permanent resident immigrants who will be immediately affected by the outcome of this case. Amicus curiae the National Center for Immigrants' Rights (NCIR), is a national resource center on immigration matters representing hundreds of organizations which have members or assist clients who will be directly impacted by the disposition of this case.

II.

SUMMARY OF ARGUMENT

(1) The alienage-employment restriction cases decided by this Court before

Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1065 (1978) and Ambach v. Norwick, 441 U.S. 68, 995 S.Ct. 1589 (1979), did not entail the exhaustive factual examinations found in the latter two cases into the precise responsibilities possessed by persons occupying the job categories in question. A new analytic framework was developed in Foley and Ambach wherein the Court first examined the nature of the job classification, and then determined the appropriate level of scrutiny to be applied. The trial in this case, held before issuance of the Foley and Ambach decisions, took only one day, Chavez-Salido v. Cabell, 427 F.Supp. 158, 161 (C.D.Cal. 1977) (Three Judge Court), and was "tried on stipulated facts." Chavez-Salido v. Cabell, Case No. 76-541-IH (C.D. Cal. June 4, 1980) (Civil Minutes at 73). Upon rehearing following vacation and remand by this Court, the trial court denied plaintiffs' "request for further discovery on the issue of the duties and responsibilities of

Deputy County Probation officers. . ." Ibid.

In light of the searching factual inquiries conducted in Foley and Ambach, it was error to deny further discovery in this case. At this point in the litigation, only evidence extrinsic to the record can establish the precise nature of the jobs in question here. The present record is totally inadequate for purposes of reaching a reasoned decision in this case, the disposition of which will substantially impact tens of thousands of immigrant workers and their families. The appropriateness of California's laws, which seek to exclude lawful permanent resident immigrants from many job categories, cannot be carefully evaluated in light of Foley and Ambach because the record contains only the parties' conflicting assertions on the nature of the job categories in question.

The record in this case does not sup-

port plenary review at this time. Given the far-reaching consequences that would accompany a disposition on the merits, amicus curiae urges that the judgment of the district court be vacated and the matter remanded for further factual development.

(2) A State may not exclude non-citizens from public employment by way of a statute which sweeps indiscriminately, without regard for the differences in the job classifications involved. The California statutes at issue here exclude non-citizens from a wide variety of jobs, many of which do not involve the performance of significant governmental functions and are not within the concept of a political community which can be legitimately restricted to citizens.

III.

ARGUMENT

(1) The District Court Judgment

Should be vacated and Remanded

There are approximately 1,300,00 lawful permanent resident immigrants residing in California. 1979 Annual Report of the Immigration & Naturalization Service, Table 4, p. 19. Disposition of this case will have a substantial impact on the ability of permanent resident immigrants in California and ultimately throughout the country to obtain employment. Despite the profound importance of this case, it comes to this Court in a factual vaccum. Amici believe that the paucity of the record makes meaningful review of the challenged statutes difficult, if not impossible. The district court judgment should be vacated and remanded for further factual inquiry.

This Court made clear for the first time in Foley and Ambach that the threshold examination in state-imposed citizenship public-employment restrictions would focus on whether excluded job classifications involve significant governmental

functions. Foley v. Connelie, supra, at 1074; Ambach v. Norwich, supra, at 1596. The outcome of this initial analysis in turn would determine the appropriate level of scrutiny to be applied. Ibid.

In Ambach, which held that school teachers are within the political community, the Court appeared to rest its analysis upon the important policy and governmental functions which public school teachers perform. The Court reviewed the precise functions of public school teachers, including the promotion of civil virtues, their serving as role models, and their influence over students' attitudes towards government and the political process. 441 U.S. at 78-80. In Foley the Court specifically expressed its obligation to "examine each [job classification] in question to determine whether it involves discretionary decision-making, or execution of policy, which substantially affects members of the

political community." 435 U.S. at 296. The Court reviewed and discussed the "variety of discretionary powers" held by New York State Troopers. 435 U.S. at 297.

In contrast, the record in this case is remarkably barren in terms of the precise nature of the job classifications which preclude non-citizen public employment under California Government Code Section 1031(a). The trial in this matter lasted only one day. Chavez-Salido v. Cabell, supra, 427 F.Supp. at 161. The case was tried on "stipulated facts" which virtually ignored the nature of the many job classifications involved in this litigation. Chavez-Salido v. Cabell, supra, Civil Minutes (July 6, 1978) at 73. While the case may have been tried on a summary record of "stipulated facts", the parties now offer widely divergent views on the actual role of probation officers in the criminal justice system, and have virtually nothing to

offer concerning the nature of the many other job classifications included in the challenged statute. Upon rehearing following vacation and remand of the district court judgment, that court denied plaintiffs' request "for further discovery on the issue of the duties and responsibilities of Deputy County Probation officers . . ." Ibid.; Joint Appendix ("J.A.") at 73.

At this point in the litigation, only evidence extrinsic to the record can establish the precise nature of the job classifications in question here. In short, this Court would have to reach beyond the record in order to make the initial determination of whether the job categories at issue here fall within the political community. Foley v. Connelie, supra, 435 U.S. at 296-97. In turn, this factual examination is critical to a determination of what standard of scrutiny will apply. Id., 435 U.S. at 295-96; Ambach v. Norwich,

95 S.Ct. at 1596.

This Court frequently vacates and remands cases in which the factual record is inadequate for a reasoned disposition. See, e.g., Truit Payne Co., Inc., v. Chrysler Motors Corp., ___U.S.___, 49 U.S.L.W. 4516, 4519 (May 18, 1981) ("the proper course is to remand the case so that the Court of Appeals may pass upon respondents' contention that the evidence adduced at trial was insufficient to support a finding of violation of the Robinson-Patman Act. . .") Amicus curiae believe that "a remand for further factual development" is required in this case. Coopers and Lybrand v. Livesay, et al., 437 U.S. 463, 473 (1978). The Court cannot reasonably decide the legal questions involved here because the record contains "only the parties' conflicting assertions" concerning the precise parameters of a probation officer's job. Mayer v. City of Chicago, 404 U.S. 189, 199 (1971) (case va-

cated and remanded). This record is "devoid of facts which would have permitted a reasoned judgment. . . [A] remand is necessary to permit further hearings to be held." Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 440-41 (1968). At this point "[o]nly evidence extrinsic to the record" can establish the justification for the challenged statutory scheme. Henry v. Mississippi, 379 U.S. 443, 452 (1964). The plaintiffs' request to pursue and present additional facts should have been granted. Czaplicki The Hoegh Silvercloud, et al., 351 U.S. 525, 534 (1956).

(2) The Challenged California Statutory Scheme Sweeps Too Broadly

Footnote 5 of the Foley opinion, 435 U.S. at 296, reaffirms the continued validity of the overbreadth criterion announced earlier in Sugarman v. Dougall, 413 U.S.

634, 643 (1973):

> This is not to say, of course, that a State may accomplish this end with a citizenship restriction that "sweeps indiscriminately", [citing Sugarman] without regard for the differences in the positions involved.

The challenged statutory scheme sweeps indiscriminately against lawful permanent residents and results from a long California history of discrimination against non-citizens.

(a) History of California Discrimination Against Immigrant Communities

As early as 1879 the Constitution of California provided that no corporation formed under the laws of the State shall in any capacity employ any Chinese or Mongolian. (Art. XIX, § 2, Constitution of

1879.) In 1880 the State Legislature passed an ordinance making it a criminal offense for a corporation to hire Chinese or Mongolian employees. California Penal Code § 179 (1880). The California Constitution further provided that "no Chinese shall be employed in any State, county, municipal, or other public work, except in punishment for crime." California Constitution, Art. XIX, § 2 (1879). It was not until 1952 that the people of California repealed Article XIX of their Constitution.

Prior to that the California Legislature had already passed "an act to protect free white labor, and discourage the immigration of the Chinese into the State of California." Law of April 26, 1862 (emphasis added). This legislation placed a special "Chinese Police Tax" on those employing Chinese and Mongolian nationals. Lin Sing v. Washburn, 20 Cal. 534 (1862).

In 1945 the California Legislature

amended the commercial fishing license statute to the effect that persons ineligible for United States citizenship could not obtain commercial fishing licenses. Cal. Stats. 1945, c. 181; Fish & Game Code § 990 (1945). This legislation was held unconstitutional in Takahashi v. Fish & Game Commission 334 U.S. 410, 68 S.Ct. 731 (1948); see also, Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886).

Bigotry against non-citizens extended to the highest levels of the California judiciary:

> The anomalous spectacle of a distinct people living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law, whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress

> or intellectual development beyond a certain point, as their history has shown, differing in language, opinions, color and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.

People v. Hall, 4 Cal. 399, 404 (1885).

California's history of discrimination against non-citizens again surfaced in 1961, when, "in one fell swoop, the legislature passed Government Code Section 1031 which applied the mandatory citizenship requirement" to a wide list of job categories. J.A. 79-80.

(b) The District Court Properly Considered Appellees Challenge to Government Code Section 1031, As Applied to All "Peace Officers"

Appellants' Opening Brief ("App. Bf.") argues that because appellees were applicants for only one class of position, deputy probation officer, they "lacked standing to assert that Section 1031a was overbroad because it might include some [job] categories. . .[which] may be found not to justify a citizenship restriction." App. Bf. 29.

(i) Scope of Review of the Challenged Statute

In Sugarman this Court examined the full reach of the citizenship restriction enacted by New York and struck down the entire statutory scheme. 413 U.S. at 639. The Court did not limit its inquiry to the particular job sought by the plaintiffs in that case. Ibid. In Foley the Court made clear that a State

may not accomplish a citizenship restriction with a statutory scheme which sweeps indiscriminately "without regard for the differences in the positions involved." 435 U.S. at 296.

Petitioners rely upon United States v. Raines, 362 U.S. 17 (1960) and Broadrick v. Oklahoma, 413 U.S. 601 (1973) in support of their argument that the plaintiffs/appellees lacked standing to challenge the full scope of Section 1031. App. Bf. 25.

First it should be noted that Sugarman was decided on the same day as Broadrick and more than ten years after Raines. Clearly, neither Broadrick nor Raines limited this Court to an examination of only the particular jobs sought by the Sugarman plaintiffs. As noted above, the Court in Sugarman analyzed the entire statutory scheme without regard to the particular jobs sought by the plaintiffs in that

case.[2/]

The plaintiffs in Broadrick challenged a statute on First Amendment vagueness and overbreadth grounds. The challenged statute was concededly constitutional as applied to their conduct and the Court held that they could not challenge the statute on the grounds that it may conceivably be applied in an unconstitutional manner in other situations not before the Court. Here the plaintiffs/appellees challenge California Government Code Section 1031(a) which requires that numerous job categories only be filled by United States citizens. Clearly they have "standing" under Article III of the Constitution of the United States. Baker v. Carr, 369 U.S. 186 (1962).

[2/] The majority in Sugarman considered the constitutionality of the challenged New York statute in its entirety, despite the urgings of Justice Rehnquist in dissent that the examination should be confined to the

The question is not one of standing, but rather whether "good judicial policy" allows plaintiffs to show the full reach of Section 1031(a) as applied to all covered job classifications. Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction, § 3531, p. 205. Should this Court reject amici's suggestion that this case be remanded, sound judicial policy would mitigate in favor of examining the total reach of the challenged statute. Section 1031(a) is one statute, clearly written, and applies to a wide variety of job classifications. The Court should not attempt to artificially divide the statute into component parts in order to save it from a Constitutional challenge.

The prudential requirement that a sta-

2/ Continued: particular jobs sought by the plaintiffs. Sugarman, supra, 413 U.S. at 662 (Rehnquist J. dissenting).

tute be construed so as to avoid deciding constitutional issues, explicated by Justice Brennan in Raines, has no application in this case. Further, the principle that statutes should be construed in favor of constitutionality where possible cannot be applied in this case because Section 1031 (a) is clear on its face and thus leaves no room for a limiting construction. This case is similar to Aptheker v. Secretary of State, 378 U.S. 500 (1964), which involved a statute clear on its face and thus not subject to a saving construction absent a wholesale rewriting of the statute, 378 U.S. at 515-16, a task more appropriately left to the legislature.

The limitation on review suggested by Justice Brennan in Raines was recognized as a court rule and not a constitutional requirement. United States v. Raines, supra, 362 U.S. at 21-22. In fact, in Barrows v. Jackson, 346 U.S. 249 (1953), the case re-

lied upon by Justice Brennan in Raines, the Court entertained a constitutional attack on a judgment enforcing a racially restrictive covenant, over the dissent of the then Chief Justice and despite the fact that the challenge was brought by white persons in behalf of black persons not before the Court. The Court justified its actions in approving such third party standing, a departure from what it referred to as "only a rule of practice", as required by the "need to protect the fundamental rights which would be denied" if the Court refused to act. 346 U.S. at 257. Thus, neither Raines nor Barrows precludes review of Section 1031(a) on its face.

/ / /

/ / /

(ii) The Challenged Statute Unjustifiably Precludes Non-Citizens Employment in Many Job Classifications

Appellees and the district court have already pointed out the numerous job classifications included within the reach of Section 1031(a). Appellees' Brief at 35-42; Chavez-Salido v. Cabell, supra at 80 (June 4, 1980). Amici will briefly examine some of these job classifications to show that they do not involve important governmental functions and are not supported by a compelling state interest.

"[T]oll service employees" must be United States citizens under the challenged statute. Chavez-Salido v. Cabell, supra, at 80 (June 4, 1980). The California State Personnel Board describes the typical tasks of a toll sergeant as follows:

> Acts as desk sergeant on an assigned shift or is respon-

sible for a special phase of the toll collection activities; assists in determining the number of toll stations required to handle traffic effectively during an assigned shift and in directing the opening and closing of stations as needed; assigns Toll Collectors to their stations and directs the taking of relief periods; may assist with collections in emergency situations; intructs new collectors in duties and works with an intructs them at their stations; takes charge in difficult situations and adjusts complaints; makes refunds on commute tickets, accepts checks or makes change on unusually large amounts; issue commute books

to collectors and keeps records on special permits; checks on the speed and accuracy of Toll Collectors; reviews Toll Collector's reports; sees that toll stations are neat and orderly and equipment in proper condition; acts as a peace officer as occasion requires; makes reports.

California State Personnel Board, Specification, Toll Sergeant, Schematic Code C540, Revised January 9, 1959. A toll sergeant, in other words, functions as a supervisor of toll collection activities on state-operated toll bridges.

Inspectors for the California Home Furnishings Bureau are also granted the powers of a peace officer in Section 19206 of the Business and Professions Code:

No person shall interefere with,

> obstruct or otherwise hinder any inspector of the bureau or the department's Division of Investigation in the performance of his duties. The chief, his duties, assistants and all inspectors in performance of their official duties, shall have the same powers, as are possessed by peace officers in this state.

The task of a Home Furnishings Bureau inspector involves inspecting upholstered furniture to insure compliance with California consumer laws. These inspectors conduct "interviews and consult with licenses to determine causes of violations and to encourage compliance . . ." California State Personnel Board, Specification, Schematic Code VW10, revised December 7, 1972. They make inspections at "retailers of

upholstered furniture or bedding or those items containing concealed filling materials. . ." Ibid. They also take "samples [from upholstered furniture in] barber shops and schools. . . cosmetology shops and schools. . . dry cleaning shops and plants. . . [and] fur hat renovators. . ." Ibid.

Also included in the scope of Section 1031(a)'s sweep are various "investigators" designated as "peace officers." California Penal Code Section 830. These include investigators for the Department of Alcoholic Beverage Control Board, the Board of Medical Quality Assurance, the State Division of Forestry, and the California Horse Racing Board. Ibid. These investigators are classified into three categories: (1) Investigator assistant; (2) investigator trainee; (3) special investigator. California State Personnel Board, Classification, Schematic Code VJ25, Revised

March 26, 1975. The "Investigator Assistant", who under Section 1031(a) must be a United States citizen, works "[u]nder close supervision as a learner and worker, to assist with the more routine phases of licensing and enforcement investigations . . ." Ibid. They "assist in determining the character of applicants for specialized licenses by means of interviews. . . [and] inspect premises where licenses are to be located." Ibid.

Public school teachers, who this Court held in Ambach could be required to seek United States citizenship, fulfill " perhaps the most important function of state and local governments. . . [Education] is required in the performance of our most basic public responsibilities. . ." Ambach v. Norwick, supra, 441 U.S. at 78. They are responsible for "inculcating fundamental values necessary to the maintenance of a democratic political

system. . ." Id., 441 U.S. at 77.

State troopers also perform a fundamental government function--enforcement of the criminal justice system. Their duties include "the apprehension of suspected criminals, investigations of suspect conduct, execution of warrants and [they] have powers of search, [and] seizure and arrest without a formal warrant under limited circumstances." Foley v. Connelie, supra, 435 U.S. at 293. This country "entrusts many of its most important policy responsibilities to these officers, the discretionary exercise of which can often more immediately affect the lives of citizens than even the ballot of a voter or the choice of a legislator." Id., 435 U.S. at 297.

In contrast, the job classifications covered by the challenged statute involve very limited and basically ministerial duties. The population they serve is

miniscule compared with teachers or State troopers. And, they are not important symbolic figures. If lawyers, who serve as officers of this nations's courts, may be non-citizens, In Re Griffiths, 413 U.S. 717 (1973), then certainly toll-bridge collectors, furniture inspectors, etc., cannot be required to acquire citizenship as a prerequisite to job eligibility. These positions clearly do not fall within "the basic conception of a political community." Sugarman v. Dougall, 413 U.S. 634, 642 (1973). Section 1031(a) is not "precisely drawn in light of [its] acknowledged purpose." Id., 413 U.S. at 642-43.

Foley and Ambach clearly provide that heightened judicial scrutiny will be applied to a state statute which excludes non-citizens from employment in job classifications which do not fall within the political community. Foley v. Connelie, supra, 435 U.S. at 295-96; Ambach v.

Norwick, supra, 441 U.S. at 74. California has shown no compelling, let alone a rational, justification for excluding non-citizens from such public employment positions as furniture inspectors and toll collectors. App.Bf. 9-23. Appellants address their arguments exclusively to the constitutionality of excluding non-citizens from the position of deputy probation officer. Ibid.

(iii) The Challenged Statute as Applied to Deputy Probation Officers

One of the probation officer's primary duties is to submit a pre-sentencing report to the court for each probationer assigned to the officer. The report must include an evaluation of the case history of the offender, the exact contents of which are dictated by statute. California Penal Code § 1203.10. The report also contains a recommendation for or against probation.

Offenses which preclude an offender from receiving probation are clearly delineated by statute. Id., § 1203. Likewise, juveniles not eligible for probation are decribed by statute. California Welfare and Institutions Code § 628. Because the contents of the report are largely statutory, probation departments increasingly use standardized forms for pre-sentencing reports. Maloney and Raymond, A Standardized Pre-sentence Report, Fed. Prob. 41:2 (June 1977).

A court is not bound in any way by the probation officer's report. Whitcombe v. Yolo County, 141 Cal.Rptr. 189 (1977). California courts refer to use of the report as "informal and optional", People v. Hutson, 221 Cal.App.2d 751, 756 (1963), and failure to consider the report does not deprive the defendant of any substantial right. People v. Journey, 129 Cal.Rptr. 478 (1976).

A probation officer's opportunity for shaping a probationer's attitude toward our nation's institutions is extremely limited. A State study indicated that a California probation officer spends, on an average, less than thirty minutes per month with each probationer. California Board of Corrections, Correctional System Study of Board of Corrections: Probation, at 31 (July 1971). More recent figures indicate that a more accurate assessment is that probation officers spend approximately eleven (11) minutes per month in direct contact with their probationers. Los Angeles County Probation Department Union Fact Sheet, at 1 (June 1981). The 1971 California study was forced to conclude that the minimal amount of time spent in direct contact between the probation officer and the probationer resulted in the probationer's family and job having a much greater influence on rehabilitation than was

attributable to the probation officer. Correctional System Study, supra, at 27. And, that the probation officer in the end plays a "rather insignificant role" in the rehabilitation process. Ibid.

Thus, the position of deputy probation officer for which the plaintiffs/appellees applied is not one which carries with it "broad power over people generally. . ." Foley v. Connelie, supra, 435 U.S. at 298. The population they serve is relatively small, and their personal contact with this population is minimal. Unlike teachers, they do not spend enormous amounts of time molding the attitudes of their probationers. The vast majority of the probation officer's time is spent compiling recommendations for the California courts. And they do not serve as important symbols or models with regards the formation of attitudes toward our democratic institutions.

Deputy probation officers do not fall

within the "political community" as that concept is conceived in Foley and Ambach. The challenged statute, Section 1031(a), therefore should be subjected to strict judicial scrutiny. Appellants have not shown that the challenged statutory scheme is supported by a compelling state interest. Graham v. Richardson, 403 U.S. 365, 376 (1971). They have not even attempted such a showing given their belief that the statute need only be defended as having a rational basis. App.Bf. 9-22. In short, appellants have not show sufficient justification for the sweeping restriction found in California Government Code Section 1031(a).

IV.

CONCLUSION

Amici first urge that this case be remanded for a further factual inquiry into the precise nature of the job classifications involved in this litigation. In the

alternative, amici believes that appellants have failed to carry their burden of showing that Section 1031(a) is supported by a compelling governmental interest in requiring that all "peace officers" be United States citizens. The term "peace officer" does not mean "police" officer or state trooper. In California furniture inspectors and toll-bridge collectors are defined as "peace officers." Without a compelling justification for Section 1031 (a)'s broad citizenship requirement, the statute should be found to violate the Fourteenth Amendment equal protection rights of lawful permanent resident immigrants.

Respectfully Submitted,

PETER A. SCHEY
TIMOTHY S. BARKER
CARLOS HOLGUIN
NATIONAL CENTER FOR IMMIGRANTS" RIGHTS
1550 West 8th Street
Los Angeles, California 90017

AMIT PANDYA
NATIONAL CENTER FOR IMMIGRANTS' RIGHTS
1511 K Street, N.W. Suite 931
Washington, D.C. 20005
Telephone: (202) 737-1444

FRED OKRAND
AMERICAN CIVIL LIBERTIES UNION OF
SOUTHERN CALIFORNIA
633 S. Shatto Place
Los Angeles, California 90005
Telephone: (213) 487-1720

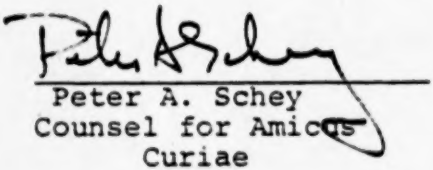
ANTONIO RODRIGUEZ
LOS ANGELES CENTER FOR LAW AND JUSTICE
2111 1/2 Brooklyn Avenue
Los Angeles, California 90033
Telephone: (213) 266-2690

MARY K. GILLESPIE
CALIFORNIA RURAL LEGAL ASSISTANCE
2111 Mission Street, Suite 401
San Francisco, California 94110
Telephone: (415) 864-3405

Counsel for Amicus Curiae

* Counsel of Record

Dated:



Peter A. Schey
Counsel for Amicus
Curiae

MOTION FILED

No. 80-990

IN THE

JUL 31 1981

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Application for Leave to File Amicus Curiae Brief in Support of Appellees/Plaintiffs and Amicus Curiae Brief.

ROBERT NEWMAN,
Service Employees International Union,
Local 535,
3418 West Sixth Street,
Los Angeles, Calif. 90020,
(213) 380-6707,
Attorney for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

Page

Application for Leave to File Amicus Curiae Brief in Support of Appellees/Plaintiffs 1

a. Interest of Amicus Curiae 1

b. Issues Presented by Applicant 2

c. Summary of Legal Argument 3

Amicus Curiae Brief 1

Argument 1

I.

Requiring Probation Officers to Be Citizens Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution 1

a. Background 1

b. There Is No Compelling State Interest Which Requires Probation Officers to Be Citizens of the United States 2

c. There Is No Rational Basis for Requiring Citizenship 8

Conclusion 9

TABLE OF AUTHORITIES

Cases	Page
Ambach v. Norwick, 441 U.S. 68 (1979) 3, 7,	8
Brown v. Board of Education, 347 U.S. 483 (1954) ..	9
Castro v. California, 2 Cal.3d 223 (1970)	2
Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976)	3
Fare v. Michael C., 442 U.S. 707 (1979)	6
Foley v. Connelie, 435 U.S. 291 (1978) 3,	8
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	6
Graham v. Richardson, 403 U.S. 365 (1971)	2
Griffiths, In re, 413 U.S. 717 (1973) 2, 3,	7
Nyquist v. Mauclet, 432 U.S. 1 (1977)	3
Oyama v. California, 332 U.S. 633 (1948)	2
Sugarman v. Dougall, 413 U.S. 634 (1973) 3, 6, 7,	8
Takahasi v. Fish and Game Comm'n., 334 U.S. 410 (1948)	2
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	2

Constitution

United States Constitution, Fourteenth Amendment 1,	2

Miscellaneous

Annual Report of the Immigration and Naturalization Service, Dept. of Justice (1980)	7
Brafford, CHP "Help Wanted" Ad Runs in Tijuana, San Diego Union, July 11, 1981, p. 1	2
California Economic Indicators, p. 3 (May 1981)	7
California State Data Center Report (unpublished) California State Dept. of Health (April 8, 1981)	6

Page

Critical Issues in Adult Probation: Issues in Probation Management, U.S. Dept. of Justice, LEAA, pp. 82, 88, 311-337, 417 (1979) 4, 5, 8

Disposition of Adult Felony Arrests, California Department of Justice, Bureau of Criminal Statistics (1980) 3

Harper, Getting Tough V: Probation — An Impossible Overload, Assoc. Press, May 6, 1981 5

53 Opinions of the California Attorney General, p. 63 (1970) 2

Probation and Parole Activities Need to Be Better Managed, Comptroller General's Report to the Congress, Washington, D.C.: U.S. Government Printing Office, pp. 12-14 (1977) 4

Probation Time Study, Administrative Office of the United States Courts, Division of Probation (1975) 4

Probation Time Study, Federal Judicial Center (1973) 4

Wallace and Neal, Probation Officers Warned: Return to Work or Lose Job, L.A. Times, July 2, 1981, Part II, p. 1 4

Statutes

California Government Code, Sec. 1031 2

California Government Code, Sec. 1031(a) 2

California Penal Code, Sec. 830.2(a) 2

California Penal Code, Sec. 830.2(h) 2

California Penal Code, Sec. 830.3(b) 2

California Penal Code, Sec. 830.3(c) 2

California Penal Code, Sec. 830.5 2

No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in his official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

Application for Leave to File Amicus Curiae Brief in Support of Appellees/Plaintiffs.

Applicant asks leave of court to file an Amicus Curiae Brief in support of Chavez-Salido, *et al.*

a. Interest of Amicus Curiae.

The Service Employees International Union (SEIU) is an affiliate of the American Federation of Labor/Congress of Industrial Organizations with 700,000 members in the United States and Canada.

Social Services Union, SEIU, Local 535, is a statewide local in California primarily representing government em-

ployees. It represents probation officers in Santa Barbara, Fresno, and Marin counties. Among its past and present members are resident aliens who have been and are now probation officers. These people have a strong personal interest in the outcome of this case. Applicant also represents a number of organized public sector employees who, given the breadth of California Government Code Section 1031(a), California Penal Code Section 830.5 and the attendant additions, could well be brought under the requirements of citizenship, *e.g.*, registered nurses, social workers, clinical psychologists.[1]

The broad, scattered, and seemingly aimless inclusion of assorted, unrelated employment areas could at any time sweep quickly into and encompass jobs which presently are excluded from these statutes.[2]

b. Issues Presented by Applicant.

Applicant union represents the interests and opinions of its probation officer members. Included among these probation officers are resident aliens who could be fired if these statutes are enforced. Their knowledge of the actual job and any corresponding need for citizenship should be included in any assessment of the constitutionality of, and necessity for, the statutes in question.

---

[1]Perhaps the only public sector employees represented by SEIU Local 535 who could not be required to be citizens are the attorneys who work as public defenders. *In re Griffiths*, 413 U.S. 717 (1973).

[2]There are about seventy occupational categories designated as "peace officers" thereby requiring citizenship under Cal. Govt. Code §1031(a). Among them are: employees of the State Department of Parks and Recreation, Cal. Penal Code §830.2(h); Volunteer Fire Wardens, Cal. Penal Code §830.3(c); Park Rangers, Cal. Penal Code §830.3(b); Investigators for the Board of Dental Examiners, Cal. Penal Code §830.3(c).

c. Summary of Legal Argument.

Alienage is a suspect class and, if limitations are placed upon a person because of his or her status as an alien, this classification must be viewed with strict scrutiny. Given the job of a probation officer as described in this brief and the parties' briefs, combined with the defendants' argument, no compelling state interest has been shown which could justify making citizenship an employment requirement.

If a job is one which goes to "the heart of representative government" then only a rational basis for requiring citizenship need be shown. The job of probation officer does not go to the heart of representative government any more than that of an engineer, a classified civil servant, a lawyer, or persons applying for educational benefits or fishing licenses. There is no rational basis for such a requirement.

For the reasons stated applicant asks leave to file an Amicus Curiae Brief.

Respectfully submitted,

ROBERT NEWMAN,
Attorney for Amicus Curiae.

No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in his official capacity as Personnel Officer for the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

AMICUS CURIAE BRIEF.

ARGUMENT.

I.

REQUIRING PROBATION OFFICERS TO BE CITIZENS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

a. Background.

To understand the significance of the myriad of indiscriminate and overly broad statutes requiring citizenship for employment, one must first recognize that California has a long and undistinguished history of discrimination. For

example, the zoning ordinance found unconstitutional in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), was a thinly disguised attempt to prevent Asians from establishing businesses. In *Takahasi v. Fish and Game Comm'n.*, 334 U.S. 410 (1948), the Court struck down a California law which prevented aliens from holding fishing licenses. That same year, the California Alien Land Act, which made it illegal for an alien to own or lease land, also was found to be unconstitutional. *Oyama v. California*, 332 U.S. 633 (1948). As late as 1970, the California Supreme Court struck down a portion of the state constitution as inconsistent with the Fourteenth Amendment because it required English literacy tests in order to vote. *Castro v. California*, 2 Cal. 3d 223 (1970).

Even today the state and county seek to enforce an arbitrary but far-reaching collection of statutes which prevent lawful residents from gainful employment simply because they were born in another country. The confusion in enforcement is illustrated by the unexplained decision of the state to ignore a statutory requirement of citizenship for Highway Patrol Officers.[3]

The state has continued this arbitrary and inconsistent enforcement even though in 1970, California Attorney General Thomas Lynch issued an opinion stating that §1031 was unconstitutional. 53 Ops. Cal. Att'y Gen. 63 (1970).

b. There Is No Compelling State Interest Which Requires Probation Officers to Be Citizens of the United States.

In *Graham v. Richardson*, 403 U.S. 365, 372 (1971), the Court found that classifications based on alienage are "inherently suspect and subject to close judicial scrutiny."

---

[3]Although officers of the California Highway Patrol supposedly must be citizens, Cal. Penal Code §830.2(a), the State Personnel Board is advertising in Mexico in a search for Latino recruits for the Highway Patrol. Brafford, *CHP "Help Wanted" Ad Runs in Tijuana*, San Diego Union, July 11, 1981, p. 1.

Subsequently, based upon this doctrine, the Court held invalid laws which made it illegal for aliens to: work in a state classified civil service position, *Sugarman v. Dougall*, 413 U.S. 634 (1973); practice law, *In re Griffiths, supra;* work as an engineer, *Examining Bd. v. Flores de Otero*, 426 U.S. 572 (1976); or receive state educational benefits, *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

In *Ambach v. Norwick*, 441 U.S. 68 (1979), and *Foley v. Connelie*, 435 U.S. 291 (1978), this Court held that an exception for teachers and police officers was created in *Sugarman, supra:* upon showing that an occupation goes to the "heart of the representative government," a state need only show a rational basis for its action. The job of a probation officer does not come within such an exception.

In 1978 Proposition 13 was passed in California. As a result of this tax law, substantial monies were lost to the government treasuries. Funds for probation officers' supervision of convicted felons and juveniles were greatly reduced.

In addition to financial constraints, the increased crime rate has led to a dramatic increase in probation officer caseloads.[4]

During this time there has been no corresponding increase in the number of probation officers. The increase in crime, the decrease in funding, and the static number of employees all directly affect the average probation officer's responsibilities. In Los Angeles County, for example, the Board of

---

[4]The number of felony arrests increased from 170,980 in 1979 to 189,303 in 1980. The number of complaints actually filed increased from 129,322 to 141,321. Likewise, incarcerations grew from 8,838 to 10,311. Those receiving either probation or probation with jail correspondingly swelled from 22,425 to 24,767. *Disposition of Adult Felony Arrests*, California Department of Justice, Bureau of Criminal Statistics (1980).

Supervisors has demanded that probation officers increase their caseloads from 150 to 300 for adult probationers and from 75 to 100 for juveniles while federal guidelines recommend a caseload of no more than 50 for adults and 33 for juveniles.[5]

An increased caseload further reduces the proportion of time officers can spend with probationers. The traditional obligation of a probation officer has been supervision of those on probation. Currently, however, most of an officer's time is spent on nonsupervisory work[6] such as investigation, personnel interviews, paper work, travel, court hearings, and telephone discussions.[7] This happens to a large extent because the terms and conditions of probations are set by the court and then implemented by the officer.[8]

Parole officers' duties are essentially the same throughout state and federal systems. *Critical Issues in Adult Probation: Issues in Probation Management*, U.S. Dept. of Justice,

---

[5]Wallace and Neal, *Probation Officers Warned: Return to Work or Lose Job*, L.A. Times, July 2, 1981, Part II at 1. The federal recommended caseload size was developed after time and motion studies discussed in the articles cited by appellants/defendants. *See also Correction*, The National Advisory Commission on Criminal Justice, Standards and Goals (1973).

[6]*Probation and Parole Activities Need to Be Better Managed*, Comptroller General's Report to the Congress, Washington, D.C.: U.S. Government Printing Office, pp. 12-14 (1977). This report is cited with approval in the materials relied upon by appellants/defendants in their opening brief.

[7]*Critical Issues in Adult Probation: Issues in Probation Management*, U.S. Department of Justice, LEAA, pp. 311-314 (1979). *See also Probation Time Study*, Federal Judicial Center (1973); *Probation Time Study*, Administrative Office of the United States Courts, Division of Probation (1975).

[8]*Critical Issues in Adult Probation: Issues in Probation Management*, U.S. Department of Justice, LEAA, p. 417 (1979). The American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals recommend that conditions of probation be solely the obligation of the sentencing judge. The American Correctional Association seems to recommend that probation officers should be given more responsibility in this area.

LEAA, pp. 311-337 (1979). It is noteworthy that the major problems officers encounter are the same, namely that caseloads are so high that little time can be spent with probationers.

The major complaint expressed by a New York probation officer is representative: probation officers have inadequate time to properly supervise their charges.[9] With a caseload of 160 probationers, a probation officer, if he or she has no other duties (including answering the telephone), can spend at most 15 minutes per week with each probationer. Similarly, in a time study conducted in Connecticut, the average probation officer (with a caseload of only 112 probationers) had .8 personal contacts and .7 telephone contacts with each client per month.[10]

Because of the many constraints, the role of probation officer is far more akin to that of a lawyer, a classified civil servant, an engineer, or a fishing license applicant than to that of a teacher or a police officer. A probation officer, like the lawyer or engineer, deals only with a limited class of people.

Teachers and police officers have daily, almost continual contact with a broad spectrum of the public. Teachers not only deal with the students, but with their parents, the public, and other educators. Police officers are highly visible enforcers of public policy as well as of public laws. They have been a traditional representative of government, as have teachers, from early history to modern times.

The position of probation officer, on the other hand, is a relatively new creation designed specifically to deal with

---

[9]Harper, *Getting Tough V: Probation—An Impossible Overload.* Assoc. Press, May 6, 1981.

[10]*Critical Issues in Adult Probation: Issues in Probation Management,* U.S. Department of Justice, LEAA, p. 88 (1979).

a limited, partially segregated group whose parameters of supervision are defined judicially. There is neither day-to-day contact with the public nor is there a history of probation officers set forth as representatives of the American way of life such as is the case for teachers and police officers.

While probation officers might well be involved in arrests and rehabilitation, as described in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Fare v. Michael C.*, 442 U.S. 707 (1979), these duties are limited to an extremely small group, 24,767 probationers in 1980 (see footnote 4) out of a population of 23,688,562 in California in 1980.[11] The position of probation officer simply does not involve the same obligations, responsibilities, or image as a police officer or a teacher.

To carry out the duties of a probation officer described in this brief and in defendants' brief, a person need not be a citizen. In fact resident alien members of Amicus Curiae union have been working as probation officers with no problems created by their lack of citizenship. In the instant case, Mr. Chavez-Salido was applying for the job of Deputy Probation Officer—Spanish speaking.

As in *Sugarman v. Dougall, supra*, this statute is "neither narrowly confined nor precise in its application." The dictates of the citizenship requirement "may apply to the 'sanitation man, class B' . . . to the typist, and to the office worker, as well as to the person who directly participates in the formulation and execution of policy." *Id.* at 634. Similarly to *Sugarman*, "The citizenship requirement sweeps indiscriminately." *Id.* at 634.

While the position of probation officer is an important one, it is not a "state elective or important non-elective

---

[11] *California State Data Center Report* (unpublished), California State Dept. of Health (April 8, 1981).

executive, legislative, or judicial position." Nor do probation officers "participate directly in the formulation, execution, or review of broad public policy [or] perform functions that go to the heart of representative government." *Id.* at 647. Finally, this simply is not a job "where citizenship bears some rational relationship to the special demands of the particular position." *Id.* at 647.

Unlike the situation in *Ambach v. Norwick, supra* at 69, where the New York statute only excluded those who "have rejected the open invitation" and did not apply for citizenship, the California statute excludes all who are not citizens. As a result, it affects large numbers of people. There are 1,440,491 resident aliens in the State of California. Of them, 1,261,069 are permanent residents.[12] If this statute is enforced in its entirety, a substantial number of people will be foreclosed from public office simply because of their status as aliens.[13]

"Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose." *In re Griffiths, supra* at 722, fn 8. The state's purpose must be "[c]onstitutionally permissible and substantial and . . . its use of the classification 'necessary to the accomplishment' of its purpose." *Id.* at 722.

There is no need for a probation officer to be a citizen; the functions of the position do not embrace a necessity to encroach upon a lawful resident's employment simply be-

---

[12]According to the *1980 Annual Report of the Immigration and Naturalization Service*, Dept. of Justice, there were 519,742 permanent residents from Mexico, 99,099 from the Philippines, 62,735 from Canada, and 62,412 from the United Kingdom. Many permanent residents also emigrated from Vietnam, Portugal, Taiwan, Korea, Japan, El Salvador, Cuba, and China.

[13]In California, 1,444,400 people work for state or local government entities. Another 322,200 work for the federal government. *California Economic Indicators*, p. 3 (May 1981).

cause that person is an alien. The job of a probation officer is like that of a lawyer, an engineer, or a civil servant. They have a reasonable amount of discretion while working within the instructions of their employer. Similarly, lawyers, engineers, civil servants, and probation officers work with limited groups. There is, as required in *Foley v. Connelie, supra* at 298-299, "no broad power over people generally."

The job of probation officer does not go to the "heart of representative government." Because of this, the state must show a compelling state interest in order to uphold this statute. They have not shown such an interest. The decision of the lower court should be affirmed.

c. There Is No Rational Basis for Requiring Citizenship.

If the state can show that a position goes "to the heart of representative government," then it need only show a rational basis for a citizenship requirement. *Ambach v. Norwick, supra* at 76; *Sugarman v. Dougall, supra* at 647.

As described above, as well as in Plaintiffs' and Defendants' briefs, officers work in a service profession designed to meet the needs of a small, well-defined group. The job requires skill and expertise. These officers justifiably have great pride in their work. Their functions, however, are clearly delimited and, as noted above, they exercise no "broad power over people generally." *Foley v. Conellie, supra* at 298-299.

The job of a deputy probation officer requires working with a small, isolated group of people.[14] Even within this group, the contacts are minimal. A requirement of citizen-

---

[14] "In summary, if we ask how probation officers actually spend their time, we find that they are most frequently in their offices, alone, occupied with paperwork." *Critical Issues in Adult Probation: Summary*, U.S. Department of Justice, LEAA, p. 82 (1979).

ship in this situation amounts to the same discrimination decried in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). The state is simply enacting a barrier to employment based on a person's racial and ethnic status.

Members of Amicus Curiae union are currently holding probation officers positions. Some of them are resident aliens. Their citizenship makes no functional or symbolic difference.[15] They perform their jobs equally well with or without citizenship papers and, further, the lack of citizenship has no impact upon either the public in general or probationers in particular. There is no rational basis for a requirement of citizenship to be a probation officer.

Conclusion.

There is no compelling state interest or rational basis which can uphold these statutes. The three-judge panel's decision should be affirmed.

Respectfully submitted,

ROBERT NEWMAN,

Attorney for Amicus Curiae.

---

[15]Under California Constitution Article XX, Section 3, all public employees must take a loyalty oath which includes an agreement to support and defend the Federal and State Constitutions.